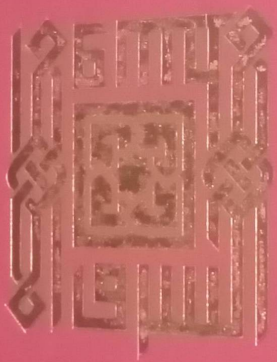
# MUSLIM PERSONAL LAW



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# FOREWORD

The Shari'ah, or Islamic Law, refers to the body of laws and legal norms of personal, civil, commercial and criminal law which constitute and regulate the moral and social order of the Muslim community.

This regulatory instrument also constitutes an integral part of the Holy Book of Islam, the Qur'an, which is effectively the prime source following which there is the Sunnah or the practice of the Prophet, together with the consensus (*ijma'*) of the people of knowledge and analogical reasoning (*qiyas*).

This study by the internationally renowned scholar Dr. Hashim M. A. Mahdi, retraces the historic and doctrinal development of Islamic personal law in such a way as to facilitate a better understanding of the fundamental rules and spirit of those rules which govern the Shari'ah.

This is not a comprehensive treatise but an introductory summary of the basic principles of Islamic personal law which are relevant and applicable to the Muslim community in general and in minority Muslim communities throughout the world.

This short work is also addressed to researchers and non-Muslims seeking to know about the Shari'ah objectively, a subject which is so often misunderstood in non-Muslim countries where too often Shari'ah is thought to be a collection of repressive laws which are both discriminatory and backward and which contradict and offend modern notions of human dignity and human rights. In reality it is quite otherwise.

The reader will be struck, for example, with the similarity of certain legal stances in Islamic personal law to Western law in cases of the

protection of the family, marital rights of spouses, child custody and laws relating to handicapped people.

One will also be impressed by the meticulous attention to detail with which Islamic personal law deals with issues of succession and inheritance and by the guarantees it gives both bequeather and heirs.

Nevertheless many other situations of family law crop up which appear to be alien to issues of public order in non-Muslim societies, such as issues affecting the rights of a married woman or those relating to the powers of the bequeather. But these differences are nominal and do not change the definite confluence of principles extant and manifested in the basic legal procedure of both regulatory systems.

For the spirit of the Shari'ah, which emanates from divine revelation, also embodies overall principles of equity, human solidarity and social justice. Generally speaking, notions of equality and fairness inspire the rules of jurisprudence applicable to both individuals and to the affairs of the Muslim family which is structured, stratified and strictly protected by Islamic law. The reader will increasingly perceive this imperative on reading this exposition of Dr. Mahdi.

Having taught law in both French and Islamic Universities, I am delighted to encounter a study which is distinguished by its clarity and concision, is undertaken with objectivity and which should lead to a more balanced approach to Islamic personal law devoid of prejudice and thus lead to a better knowledge of those values common to both our society and Muslim society.

Thanks to Dr. Hashim M. A. Mahdi we now have a worthy tool for understanding some of these essential issues.

Professor Francis Lamand
President, Islam and the West, Paris, France

# PREFACE

## *An Explanatory Note Regarding Muslim Personal Law*

In the earlier part of Islamic history the Islamic judiciary had no other source of personal law than the injunctions of the Qur'an, the sunnah of the Prophet, peace be on him, the legal opinions of his companions and the independent judgements of the judges themselves.

This was so till the rules of the various schools of law came to be written down and became the source of guidance for judges and jurists. Subsequently most judges followed the school of Abu Hanifa as it was the prevalent juridical school in the Abbasid period from the time of Imam Abu Yusuf's appointment to the office of Chief Justice during Harun al-Rashid's reign. After that it became the official school of law in the Ottoman state, except for the administration of justice in Islamic Spain, North and West Africa which is based on the Maliki School of law, and except for the Ayyubid period when it was based on all four schools of law – Hanafi, Maliki, Shafi and Hanbali.

The Ottoman government in fact made judges and jurists in general conform to the preponderant views of the Hanafi school including rules relating to personal matters. The Ottoman courts of justice and juridical circles continued to follow this school for a long time till it became evident that it was necessary at times to deviate from the preponderant opinions of the Hanafi school and to draw upon the views of the other three schools as well as of Imams other than those belonging to these four schools; as it was also found necessary to collect the rules of the Shari'ah in a public and generally recognised code of law for the use of the judges, scholars and plaintiffs. This realisation came because:

a. There were many and varied interpretations in the school itself so that it was not clear which was the most authentic. As a result there were great differences in judgements and legal pronouncements; and it became difficult for some judges and plaintiffs to arrive at a decision easily and quickly.

b. Due to this fact there came about some changes in the customs and norms upon which some of the rules had been founded; as also previously unknown situations emerged. These called for the acceptance of some of the rules of the other schools of law and the independent judgements of some of the companions of the Prophet (peace be on him), the *tabi'in* and the legists.

Hence in 1336AH, the Ottoman government promulgated a code of Shari'ah law on Family Rights which was given effect in its dominions including the territories which subsequently became independent of it. In some of those countries this code continues to be applied till today.

Shortly afterwards, Egypt promulgated a law first in 1920 and then another in 1929, in both of which the same methods were followed as had been adopted in the case of the Ottoman Family Rights Law. Then in 1936, a committee was set up in Egypt under the chairmanship of the Shaikh of al-Azhar, the Mufti of Egypt, the Chief Justice of the High Shari'ah Court, the Shaikhs of the four schools of law at the Jami' al-Azhar, and representatives of the Ministry of Justice, the Faculty of Law, the Union of Lawyers and Judges and others as members, for the purpose of framing a comprehensive code of personal law.

Successive meetings of this committee were held, but it accomplished only a part of its work. Then after the Second World War, the desire for it was repeatedly expressed during the period of the Egyptian Republic; but till now no final code has been issued.

Similarly since 1945, Syria responded to the need to review Ottoman Family Law and to prepare a new draft treating those matters that it had become necessary to deal with, and entrusted the task to its prominent judges. In 1946, the Ministry (of Justice) deputed an eminent judge, Shaikh Ali al-Tantawi, to Egypt for one year to prepare a draft of the personal law. In 1949 the government set up a committee to study and consider the draft, again in 1951, the



Ministry of Justice constituted a new committee and strengthened it by inducting into it great scholars from the Faculty of Law and from among the judges, including two eminent Professors, Mustafa Ahmad al-Zarqa, Professor in the Faculty of Law, and Ali al-Tantawi, the Shari'ah Qadi of Damascus. In 1953, the Syrian government gave its assent to the draft prepared by those great scholars and promulgated a law which is acted upon there till today.

This is the law we have selected for presentation to all Islamic minorities of non-Muslim states, acting in accordance with the efficiency demanded of us after a long wait in this regard and desirous of accomplishing the work within the time limit set for us. We have selected this law because its preparation matured for nine years at the hands of eminent scholars and committees, first in Egypt and then in Damascus, and because it has dealt with all that needs to be dealt with in the present day. We did not change any of it except Article 233 which relates to some administrative rules regarding bequests to descendants and others, selecting what is most suitable, least complicated and the easiest to apply; nor did we add anything to it except some explanatory words here and there, and those mostly as footnotes to some of the articles; nor have we omitted anything except what is only of Syrian local and administrative nature and not related to the basic rules of Shari'ah.

Finally, we thank Allah Almighty for His vast timeless help. Our gratitude also goes to His Excellency Dr. Ma'ruf al-Dawalibi of the Royal Court of Saudi Arabia whose help was invaluable in preparing the items of this law as well as his Eminence Abdullah bin Jubair, Chief of the Appeal Court of Saudi Arabia who revised the items of this law.

Dr. Hashim Mahdi

# DEDICATION

I DEDICATE this book to my Creator the Lord of the worlds Whose blessings are prevailing and continuous; then to his Prophet Muhammad, the master of all mankind, peace be upon him, his family and his Companions, for without the spirit of his message this work would have never been.

To the memory of my unforgettable parents, may Allah be pleased with them, in the Hereafter, for having given me the best upbringing.

Also I cannot forget my wife's patience, my children's support and my friends' encouragement.

Finally I thank all those who read the manuscript, corrected mistakes and helped in every way possible to complete this work and make it available and interesting for the readers. May Allah grant His satisfaction to all in this world and the Hereafter.

Professor Hashim Mohammad Ali Mahdi
Friday, 25th July 2008

# INTRODUCTION

In order to understand the significance of Dr Hashim Mahdi's book, *Muslim Personal Law*, it is important to be aware of the legal and social context within which it has come to be published.

We live in a society where some jurists argue that man-made laws should be in harmony with divinely revealed laws, while others who believe neither in God nor divine revelation insist that 'divinely revealed' laws should only be tolerated if they do not conflict with secular laws. Secular jurists speak about man-made laws as if they were divinely revealed while referring to divinely revealed laws as if they were man-made.

We live in a society which in the last hundred years has changed almost beyond recognition. The European countries which used to be ruled by Christian monarchs are now governed by secular democratic systems, with the bank replacing the cathedral as the most imposing building in the city. Similarly, there is hardly a Muslim left on the face of the earth today who knows what it is like to be governed by a khalif, or by a ruler appointed by a khalif, the most recent of whom was Sultan Abdulhamid II, who was deposed on 6th Rabi' ath-Thani 1327 / 27th April 1909. As with the cathedral, the central mosque is now dominated by the central bank.

In the modern brave new world, there is not a single country that can accurately assert that all of its laws are in harmony with divinely revealed laws.

During the last hundred years, rule in accordance with the Shari'ah of Islam under the Ottoman Empire has disappeared, while rule under its successor, the Bankers' Empire, is itself currently on the verge of collapse. Not one of the post-colonial era 'Islamic' states can

be described as being governed in accordance with the Shari'ah of Islam, while all of them have the national debts which provide the leverage needed to ensure that the dictates of the IMF and the World Bank are obeyed. One of the laws of the IMF is that no member country may use bi-metal (gold and silver) currency as a medium of exchange – which is why all the 'Islamic' states have abandoned the traditional currency of the Muslims, the gold dinar and the silver dirham, and have submitted instead to worthless paper, plastic, or electronic digital tokens as their means of exchange.

As a result of this transfer of power from the political realm to the economic realm, many of the traditional centres of Islamic teaching and learning in what were once described as the Muslim lands have been closed down or 'modernised'. Although traditional Islamic sciences are still taught around the world, they have often been reduced to subjects of study, rather than the living and transformative sciences of doing or deciding things which they once were.

And yet in spite of ferocious and equally ignorant attacks on Islam and the Muslims by armies of journalists and soldiers alike, most of whom have not even bothered to study or try to understand its teachings, Islam is the fastest growing religion in the world, with even some of its greatest critics becoming its greatest supporters.

The greatest threat to the teachings of Islam therefore is that wherever they are not embodied by people of wisdom they are in danger of becoming refashioned, reformed and redefined into a state religion which, whilst permitting personal worship and the individual quest for truth and self-enlightenment, ensures that the dominant secular political and economic spheres of human activity, the former masking the latter (democratic usury), remain unaffected and impervious to the way of Islam, which is indeed a way of life and neither a set of rules nor a collection of principles.

And throughout the world, the *muminun*, those who trust in Allah, strive to learn and live the same Islam which was first established and embodied by the Prophet Muhammad and his family and companions and the first generations of their immediate followers, may the blessings and peace of Allah be on all of them, who were the best community that Allah has ever raised up on the earth – not the most primitive and certainly not barbaric.



This process, which is activated and driven by love of Allah and His Messenger, takes place principally by means of direct transmission from one person to another – but part of this process also involves the study of source texts and the commentaries which explain the meanings of these texts.

The source texts, the Qur'an and the authenticated Hadith, are well known and well protected, but in the current age, facilitated by modern technology, an almost bewildering number of books on Islam are available. Some are inaccurate and misleading, some are well intentioned but out of focus – and some are invaluable and nourishing.

It is in this legal and social context, where Muslim communities are everywhere present, but nowhere in charge of their own governance or finance, that the possibilities of implementing at least some if not all of the Shari'ah of Islam are identified and discussed.

Dr Hashim Mahdi's book on *Muslim Personal Law* is a book which deals with some of the aspects of Muslim civil law which historically have been implemented both under Muslim and non-Muslim colonial rule. This book is worth reading for anyone who wishes to acquire more than a superficial knowledge of the subject. It summarises the main principles of those aspects of the Shari'ah which govern the most fundamental personal human relationships in a straightforward and yet comprehensive manner. As Dr Hashim Mahdi makes clear in his Foreword, it represents a culmination of one of the mainstream Sunni attempts to codify these aspects of Islamic law, based on centuries of practical application and experience – and relying principally on the Hanafi *madhhab*.

As such, although it is as impossible to codify Islam as it is to codify life itself, it nevertheless provides the reader with a reliable checklist of the identifiable features of the Shari'ah which govern the fundamental milestones in life which most people experience during their life's journey: birth, childhood, marriage, divorce, death and inheritance.

The knowledge of a judge in a Shari'ah court would not be limited to the contents of this book, but a student of Shari'ah – who might one day become a judge – will find this book helpful in pursuing initial or intermediate studies. Dr Hashim Mahdi recommends

that it is utilised and implemented throughout the world by Muslim communities, whether they constitute a majority or a minority of the general population of any given country.

In other words, this book represents more than a subject of study. It opens up several aspects of the Shari'ah which can be implemented today. And in the modern legal and social context this is significant: as more and more Muslim communities begin to emerge in countries in which the way of Islam is being established for the first time, the possibilities of Muslims actually living what their divine guidance calls on them to follow are always being identified, activated and established.

Ignorant people inevitably produce extreme interpretations of this guidance, but balanced Muslims seek only to follow a middle course through life. By leading their lives in this way, they seek the mercy and compassion of their Creator and the Originator of this guidance, in this world and in the next.

Since God is the Source of everything that exists, including the human race and the situations in which people find themselves, it comes as no surprise to Muslims that God has not had to experiment when defining the boundaries between what behaviour is acceptable, or doubtful, or unacceptable – nor has God had to speculate about what laws should govern fundamental relationships between people. Muslims believe that God has always been in the unique position of being able to get everything right first time, simply because God knows best!

For those who believe there is no God, such a perspective is anathema – but for those who believe there is no god except Allah and that Muhammad is the final Messenger of Allah – the Muslims – the Shari'ah is viewed as a mercy, which is why it is a road which they wish to follow.

And wherever there is a significant body of Muslims, living as a community, these wishes cannot simply be ignored – especially when it is recognised by people of intellect that this is not a bad thing and especially since it is recognised and accepted that the Shari'ah is for those who wish to be governed by it – and not for those who reject it.

It is important to note that in those countries where the Shari'ah is the law of the land, it does cater for minority non-Muslim communities



living within Muslim governed territory. This is known as the *dhimma* contract. In exchange for payment of the *jizya* tax (four gold dinars, equivalent to approximately the price of four sheep) by all of its able-bodied men, a minority non-Muslim community living in Muslim territory is legally entitled to protection by the Muslims in times of danger and legally permitted to be self-governing in all its members' personal law matters.

It is this condition of *dhimmi* status which minority Muslim communities are seeking to acquire in the non-Muslim countries in which they reside today – and it is within this relatively limited context that the possibility of secular legal systems accommodating religious personal law is currently being considered and debated.

Thus in 1429 / 2008, a year which will soon be located in the past, it is significant that both the Archbishop of Canterbury and the Lord Chief Justice of England and Wales have publicly recognised that *Muslim Personal Law*, the title and subject of this book, has a place in English law – not as a parallel Shari'ah jurisdiction in competition with the English legal system and certainly not as part of a subversive legal coup d'état designed to replace entirely the former with the latter – but in a valuable supplementary role.

Thus the Archbishop of Canterbury, Dr Rowan Williams, while accepting in his lecture given on 7th February 2008 that a detailed discussion of the Shari'ah is beyond his competence, drew attention to "some of the broader issues around the rights of religious groups within a secular state, with a few thoughts about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom."

The Lord Chief Justice of England and Wales, Lord Phillips, while accepting in his lecture given on 7th July 2008 that Shari'ah law, "is not a topic on which I can claim any special expertise," looked positively at the interaction between the practice of Islam and the application of the law of the land.

Both the Archbishop and the Lord Chief Justice were broadly in agreement as to the status of English law. The Archbishop stated that, "the law of the Church of England is the law of the land" (and therefore implicitly **not** the law of Moses which Jesus came to uphold), while the Lord Chief Justice stated that, "British law has,

comparatively recently, reached a stage of development in which a high premium is placed not merely on liberty, but on equality of all who live in this country. That law is secular. It does not attempt to enforce the standards of behaviour that the Christian religion or any other religion expects ... Whilst breaches of the requirements of any religion in the UK may not be punished by the law, people are free to practise their religion. That is something to be valued."

The Lord Chief Justice illustrated his statements by outlining what degree of religious freedom is permitted by British law. He quoted Article 9(1) of the European Convention on Human Rights (as incorporated in English domestic law by the Human Rights Act 1998) which provides:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private life, to manifest his religion or belief, in worship, teaching, practice or observation."

The Lord Chief Justice also quoted Article 14 of the Convention which requires all the signatories to ensure that:

"The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Lord Chief Justice did not quote Articles 1 and 13 of the Convention which require all the signatories to secure all Convention rights by providing an effective remedy for breaches of Convention rights.

Article 1 states:

*"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*

Article 13 states:

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*



The Lord Chief Justice also did not quote Article 9(2) of the Convention which sets out the broad limitations to the exercise of the Article 9(1) right:

*"Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*

The Lord Chief Justice also did not quote Section 13(1) of the Human Rights Act 1998:

*"If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."*

Given this well-established and important legal right of British Muslims either alone or in community with others and in public or private life, to manifest their religion or belief, in worship, teaching, practice or observation, both the Archbishop of Canterbury and the Lord Chief Justice sought to define acceptable limits within which this right can be exercised.

Thus in examining "the role of Shari'ah (or indeed Orthodox Jewish practice) in relation to the routine jurisdiction of the British courts", the Archbishop of Canterbury explored the possibility of the "transformative accommodation" of certain aspects of the Shari'ah as a "supplementary jurisdiction" whereby there could be "a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters." He continued, "This may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution – the main areas that have been in question where supplementary jurisdictions have been tried, with Native American communities in Canada as well as with religious groups like Islamic minority communities in certain contexts."

In assessing this view, in his talk the Lord Chief Justice said, "It was not very radical to advocate embracing Shari'ah Law in the context of family disputes, for example, and our system already goes a long way towards accommodating the Archbishop's suggestion. It is possible in this country for those who are entering into a contractual agreement

to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Shari'ah Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales."

Although neither the Archbishop nor the Lord Chief Justice went so far as to make any detailed recommendations or suggestions as to how the law of England and Wales could be developed so as to recognise and accommodate Muslim Personal Law, they have both attracted negative media attention, particularly the Archbishop of Canterbury. For the most part, their critics have displayed such a degree of ignorance of what the Shari'ah is and as to what the Archbishop and the Lord Chief Justice have actually said about it, that they have unwittingly provided us all with a vivid lesson on what the true characteristics of ignorance and arrogance are.

The most basic of their criticisms has been that the law of the land must be protected at all costs from 'foreign' influences, so that the English 'way of life' is not changed beyond recognition.

As far as change is concerned, I remember my parents, may God bless them, telling me not so long ago that the England which they used to know had already gone, forever.

As far as protecting the law of the land is concerned, this attitude reveals a profound ignorance of English history: current English law already combines aspects of Celtic law, Viking law, Roman law, Judaic law, Christian law and Norman law, all of which were once 'foreign' to the British Isles – and all of which through time have developed into the common law as interpreted by judges and amended or replaced by statutory law. The mottos of 'Dieu et mon droit' and 'Honi soit qui mal y pense' which greet anyone who enters a civil or criminal court in England and Wales can hardly be described by any stretch of the imagination as good old Anglo-Saxon aphorisms.



Even those who staunchly assert in the face of today's multi-racial, multi-faith, multi-cultural society that "England is a Christian country with Christian laws" appear to overlook the fact that Jesus was from Palestine (descended on his mother's side, peace be on her, from the Tribe of Israel), that he was sent by the same God as the God who sent Abraham, Moses and Muhammad – and that his original teachings and way of life bear a striking resemblance to all the original teachings and ways of life of all of the Messengers of God, may the blessings and peace of Allah be on them, none of whom were British citizens.

Historically, the Shari'ah of the Messengers of Allah has always been instantly recognisable as such. It is the way of submission to God – which is the meaning of Islam – and in every age this has always been accepted by those who accept and rejected by those who reject.

As far as the Muslims living in the UK today are concerned, it is their secular legal right to be able to follow the way of Islam provided this does not interfere with the interests of public safety, the protection of public order, health or morals and the rights and the freedoms of others. The government of the day is under a legal duty to secure this right and to provide a remedy if this right is violated, while the courts of the land *must have particular regard to the importance of this right* in determining any question arising under the Human Rights Act 1998 which might affect the exercise by a religious organisation (itself or its members collectively) of this right.

It was with this right firmly in mind that proposals were made to the Law Commission in March 2007, well before the Archbishop of Canterbury and the Lord Chief Justice raised the subject in public, as to how the laws of England could be changed in order to accommodate Muslim personal law, particularly by recognising Muslim marriages, Muslim divorces and Muslim inheritance and including the recognition of the binding nature of judgements passed by Shari'ah courts – which, as also proposed by the Lord Chief Justice in his talk, would only be enforceable by recourse to the English civil courts. These proposals were summarised briefly in an article entitled: Thinking Outside the Box: The Shari'ah of Islam (http://www.wynnechambers.co.uk/pdf/Thinking_Outside_the_Box.pdf).

Most people, from a tender age, know the difference between what is fair and unfair. Most of us, when we suffer an injustice, want justice. There is no harm and much good in utilising whatever promotes and establishes justice between people. The Shari'ah of Islam is but one way of doing justice and although Muslims have always believed that it is by far the best way of doing justice amongst themselves, because its source is divine, even non-Muslims who have intellect have been able to recognise that there is much good in it, provided that it is implemented by wise people who know and understand it well.

I have no doubt that this book will help many people to recognise and understand both the simplicity and profundity of those aspects of the Shari'ah which govern Muslim personal law. It may even encourage them to reflect further and contemplate what it would be like to live in a usury-free economy governed by a wise God-fearing ruler. Certainly it will be one of the means whereby Muslim personal law is eventually introduced and accepted as an invaluable part of the English legal system, insh'Allah – God willing.

To conclude: in his talk the Lord Chief Justice quoted the following words of Sir John Donaldson: "The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute." The Qur'an describes the Muslims as those who say, "*We hear and we obey*." In recognising rather than restraining Muslim personal law, English domestic law will be enriched – while the Muslims who obey and embody it will as promised be rewarded in both worlds by the Lord of the worlds, Allah.

Ahmad Thomson
Wynne Chambers, London
Rajab Al-Khair 1429 / July 2008

# Part One

# MARRIAGE

CHAPTER 1

# MARRIAGE AND BETROTHAL

Article 1. Marriage is a contract between a man and a woman who is not prohibited to him by law.[1] Its aim is to provide a bond for common life and the procreation of progeny.

Article 2. Mere engagement, promise to marry, recitation of the Surat al-Fatiha, receipt of dowry and acceptance of presents do not constitute marriage.

Article 3. Either the fiancé or the fiancée may renounce an engagement.

Article 4. i. If the fiancé renounces the engagement after having paid a dowry in cash and the fiancée having bought with the money articles for her use, she may choose either to pay him back the same amount of cash or hand the articles over to him.

ii. If the fiancée renounces the engagement she has to pay the dowry back or its equivalent in value.

iii. The presents shall be governed by the rules regarding gifts.

[1] That is, there exists no legal prohibition against marriage between the two as explained in Articles 33 to 39 below.

CHAPTER 2

# ESSENTIALS AND CONDITIONS OF THE MARRIAGE CONTRACT

**Section I: Consent and Announcement**

Article 5. Marriage is contracted by means of an offer[2] from one of the two parties and acceptance[3] by the other.

Article 6. Offer and acceptance in the marriage contract may be made by using such words as convey the meaning literally or according to custom.

Article 7. If one of the parties is absent from the venue of the marriage, offer or acceptance may be made in writing.

Article 8. i. The appointment of an agent for contracting the marriage is permissible.

ii. An agent may not himself marry the woman whom he represents to someone else unless that is specifically provided for in the instrument of agency.

Article 9. If the agent exceeds the terms of his agency he will be considered an uncommissioned agent and the contract made by him shall remain suspended till proper permission is accorded it.

Article 10. A dumb person may make an offer or accept an offer in writing if he can do so, and if not, by a known signal on his part.

[2] An "offer" is the expression uttered in the first instance by one of the parties to the contract.

[3] "Acceptance" is the expression uttered by one of the parties in the second instance.

Article 11. i. Offer and acceptance must be in accord with each other in every respect, and be made in one and the same sitting, provided that each of the contracting parties hears the words of the other and understands that what is intended is marriage; also provided that before acceptance is completed nothing occurs from either of the parties which invalidates the offer.

ii. An offer becomes invalid before acceptance if the party making the offer loses his competence to do so or if anything occurs showing reluctance or aversion on the part of either of the parties.

Article 12. To be valid, a marriage contract shall be witnessed by two Muslim males or by one Muslim male and two Muslim females provided that they be of sound mind and be majors and that they hear the offer and acceptance and understand their purport and intention.

Article 13. A contract of marriage cannot be an act *in futuro*[4] nor can it be made contingent on an unfulfilled condition.[5]

Article 14. i. If the marriage is contracted with a condition which contravenes the legal provisions of marriage[6] or is incompatible with the objectives of marriage[7] and which makes obligatory anything that is unlawful, then such a condition shall be void but the marriage contract shall be valid.

ii. If it is contracted with a condition stipulating such a beneficial interest in favour of the bride as is not prohibited by law and which does not adversely affect the interest of the others, nor does it restrict the husband's freedom in his lawful personal activities, then such condition shall be valid and binding.

[4] For instance, to say: "I shall marry you after a month". Expressions like this may be regarded as only a promise to marry.

[5] That is, unfulfilled at the time of making the contract. For instance, saying: "I shall marry you, when the spring comes"; for the essence of marriage is that it should be an accomplished act.

[6] Like requiring the bride to pay *mahr* or providing that the husband shall not be responsible for her maintenance.

[7] For instance, one of them stipulates the adoption of means for preventing pregnancy and birth.



iii. If the woman stipulates a condition in the marriage contract which restricts the husband's freedom in his personal activities or affects the interests of others, such condition will be valid but it will not be binding on the husband; and in the case that the husband does not fulfil the condition, the wife will be entitled to demand dissolution of the marriage.

**Section II: Competence**

Article 15. i. To be competent to marry, a person must be mentally sound and have attained the age of majority.

ii. The judge may accord permission to an insane or mentally retarded person to marry provided it is proved by the report of a board of experts in mental illnesses that his marrying would help cure his ailment.

Article 16. Competence to marry is attained by a boy when he completes eighteen years of age and by a girl when she completes seventeen years of age.

Article 17. The judge may refuse permission to a married man to take another wife if it is found that he is unable to maintain both wives.

Article 18. i. If a male adolescent, on completion of fifteen years of age, or a female adolescent on completion of thirteen years of age, claims that he or she has attained puberty and asks for permission to marry, the judge may permit it if he is convinced of the truth of their claims and of their physical fitness.

ii. In such case, if the guardian is either the father or the grandfather, his consent is necessary.

Article 19. It is possible the judge may not allow the marriage if the suitors are found to be incompatible in respect of age and that such marriage will serve no purpose.

Article 20. If a major girl after completing seventeen years of age intends to marry, the judge shall seek the opinion of her guardian within a specified period of time. If the guardian does not make any objection to the marriage or if his objection is not worth considering, the judge may

allow the marriage, provided the condition of equality is fulfilled.

### Section III: Guardianship of Marriage

Article 21. A guardian for marriage shall be from amongst the agnates in their own right,[8] the order of precedence being the same as that in respect of inheritance; provided that he is within the prohibited degrees.[9]

Article 22. i. A guardian shall be a major of sound mind.
ii. In the event of there being two guardians of equal proximity of kinship, the marriage performed by either one according to its terms and conditions shall be valid.

Article 23. If the nearest guardian is absent and the judge is of the opinion that waiting for the former's opinion will cause the interests of the marriage to lapse, the guardianship shall devolve on the next of kin.

Article 24. The judge shall act as guardian for a person who has no guardian.

Article 25. The judge is not entitled to dispose of any person in marriage who is possessed of full powers of guardianship over himself, nor are his ascendants or descendants so entitled.

### Section IV: Equality (*Kafa'ah*) in Marriage

Article 26. The basic condition for a marriage contract to be legally binding is that the man should be the equal of the woman.

Article 27. When a girl who has attained majority herself contracts a marriage without her guardian's consent the marriage shall be binding if the husband is her equal, otherwise the guardian has a right to demand dissolution of the marriage.

Article 28. The custom and usage of the country shall be the deciding factors in determining equality.

Article 29. Equality is an exclusive right of the woman and the guardian.

[8] That is, any blood relation on the male side as explained in Article 272.
[9] That is, a person who is prohibited from marrying her.



Article 30. The right to demand dissolution of marriage on the grounds of nonexistence of equality lapses if the woman becomes pregnant.

Article 31. Equality shall be taken into account at the time of making the marriage contract. The subsequent disappearance of equality shall have no legal effect.

Article 32. Where the woman stipulates equality at the time of making the marriage contract or the husband informs her that he is her equal but subsequently it is found that he is not, either the guardian or the wife has the right to seek dissolution of the marriage.

### Section V: The Prohibited Degrees of Women

*A – Permanent Prohibition*

Article 33. It is unlawful for a person to marry anyone of their ascendants and descendants, the descendants of their father and mother[10] and the first degree in the order of descent from their grandparents.

Article 34. It is unlawful for a person to marry:
i. The spouse of any of their ascendants and descendants and any person who has had sexual intercourse with anyone of them.
ii. The ascendants of a woman or man with whom he has had sexual intercourse, their descendants and also the ascendants of his spouse.[11]

Article 35. i. Fosterage prohibits in the same manner as does blood relationship except in those cases that are precluded by the Hanafi jurists.
ii. To be a grounds for prohibition fosterage must relate to the first two years of age and the breast-feeding must have been at least five times, each time the child being satisfied, however little or much the amount of feed might be.

[10] How low soever.
[11] Similarly her descendants, if the man had sexual intercourse with his wife thinking that she was his concubine.

*B – Temporary Prohibition*

Article 36. i. It is not lawful for a couple to remarry who have been divorced "three times" except on completion of the *'idda* (prescribed period of waiting) on the wife's part after having been married to another husband and the latter in fact having consummated the marriage.

ii. Marriage of a divorced woman with another person obliterates the number of times divorce was made by the previous husband, even though they were less than three. Therefore if she returns to that previous husband he shall be entitled to pronounce divorce for another "three times" over her.

Article 37. It is not lawful for a man to marry a fifth wife unless he has divorced one of his four existing wives and the prescribed waiting period (*'idda*) has expired.

Article 38. It is not lawful to marry another person's ex-wife or his divorcee while she is in the process of completing her prescribed waiting period (*'idda*).

Article 39. The conjunction of two women as wives to the same person at the same time is unlawful if the two women are so related to each other that if either of them were a male the other would be prohibited for him.[12] If it is found that such a marriage between them would be lawful then their conjunction as wives for one person at the same time would be lawful.

**Section VI: Marriage Procedure**

*A – Procedure preliminary to the conclusion of a marriage contract*

Article 40. i. An application to marry shall be submitted to the judge of the appropriate locality with the following documents:

a. A certificate from the chief (mayor) and (or) respected persons of the locality on behalf of both the fiancé and fiancée mentioning their age, place of residence, and

[12] e.g. if the two are sisters. If one of them was a male, then he could not marry his sister. Therefore, the two sisters cannot be married by one man at the same time.



her guardian's name and his certifying that he has no legal objection to the conclusion of the proposed marriage contract.

b. Attested copies of the personal files and particulars of both the parties.

c. A certificate from a doctor selected by both the parties, testifying that they are both free from contagious diseases and physical handicaps likely to prevent marriage. The judge shall verify the matter with the expert advice of a doctor of his choice.

ii. A marriage performed outside the court shall not be confirmed unless the requirements of the aforesaid procedure have been complied with, provided that if a child has been born or if there is obvious pregnancy, the marriage will be confirmed without the aforesaid procedure, but such confirmation will not exclude the award of the legal punishment.

Article 41. The judge shall, immediately on completion of these documents, accord permission for the conclusion of the marriage contract. If he is in doubt on any point, he may delay announcing his permission for a period of ten days. It is at the judge's discretion to choose the mode of announcement.

Article 42. If the marriage is not contracted within six months (after the judge has accorded his permission), the permission will stand cancelled.

*B – Contract Procedure*

Article 43. The judge or any official of the court authorised by him will conduct the marriage contract.

Article 44. The marriage contract deed shall specify the following:

i. Full names and addresses of the two parties.

ii. The fact of the conclusion of the marriage contract, its date and place.

iii. Full names and addresses of the witnesses and the agents.

iv. The amount of "prompt" and "deferred" dowry and whether the "prompt" part has been received or not.

v. Signatures of the parties concerned and of the authorised official and also authentication by the judge.

Article 45. i. The court aide shall register the marriage in his special register and shall send a copy of it to the Civil Affairs Department within ten days of the marriage.
ii. The copy thus sent will exempt the two parties from the duty of notifying the Civil Affairs Department about the marriage. The court aide shall be responsible for failure to send the copy to the Civil Affairs Department.

Article 46. Marriage procedures shall be exempt from the payment of any fees.

**Section VII: Kinds of Marriage and Rules Regarding Them**

Article 47. Where all the elements of a marriage contract are present and all the conditions for its solemnisation have been fulfilled the marriage shall be considered "valid".

Article 48. i. Any marriage contract which fulfils the basic elements of offer and acceptance but which falls short of some of the conditions shall be considered "irregular".
ii. Marriage of a Muslim woman with a non-Muslim man shall be void.

Article 49. A valid marriage shall entail adhering to all conjugal rights such as dowry, maintenance of the wife, duty of care, mutual rights of inheritance between the couple, such family rights as legitimacy of the children and the prohibition of marrying on the grounds of specific kinships (marital relationship).[13]

Article 50. A void marriage shall not have any of the legal effects of a valid marriage even though consummated.

Article 51. i. An irregular marriage, if not consummated, shall be considered similar to a void marriage.
ii. If consummated, it will give rise to the following:
a. Payment of the dowry, whether or not it was specified.

[13] That is, such relationship as would render marriage with her ascendants and descendants unlawful, as laid down in Section V of Chapter 2.



b. The legitimacy of children with all its consequences as laid down in Article 133 of this statute.
c. Prohibition of marriage[14] on the grounds of affinity.
d. *'Idda* on termination of the marriage either by separation or by death and maintenance during *'idda* but no mutual rights of inheritance between the spouses.[15]
iii. The wife shall be entitled to maintenance as long as she is unaware of the irregularity of the marriage.

Article 52. A "suspended" marriage[16] before permission is accorded to it shall be considered similar to irregular marriage.

[14] Prohibition of marriage with close relatives of the woman with whom marriage was consummated.
[15] After the expiry of the *'idda*.
[16] That is, a marriage based on a contract which has not been accorded permission by the person for whom it has been made.

CHAPTER 3

# THE EFFECTS OF MARRIAGE

Section I: **The Dowry**

Article 53. The wife shall be entitled to dowry *ipso facto* on conclusion of a valid marriage contract, whether any dowry has been specified at the time of the marriage or not, or has even been originally negated.

Article 54. i. There is no minimum or maximum limit to dowry.
ii. Everything that can be legally pledged can validly serve as dowry.

Article 55. The whole or part of the dowry may be made "promptly" or "deferred". If nothing is stipulated, the usual custom in this regard shall be followed.

Article 56. If no other date is stipulated in the marriage contract the payment of deferred dowry may be postponed till the time of "*baynunah*"[17] or death.

Article 57. The husband may increase the dowry after the contract and the wife may reduce it, provided both are legally competent to act on their own. Such increment or reduction shall be annexed to the original contract, if the other party so agrees.

Article 58. If a dowry has been specified in a valid marriage contract and divorce takes place before consummation of the marriage and the enjoyment of "marital seclusion", then half the dowry shall be due.

[17] That is, the irrevocable dissolution of the marriage.

Article 59. If dissolution of marriage (*baynunah*) takes place in consequence of a cause arising from the wife's side and before consummation of the marriage and the enjoyment of marital seclusion, then the dowry in full shall be forfeit.

Article 60. In the case of a virgin (*bikr*), her dowry shall be deemed to have been duly discharged if it has been received by her legal guardian who is either her father or "true grandfather", even though she is fully competent to act on her own, unless she forbade her husband to make payment to the guardian.

Article 61. i. If in a valid contract, no dowry has been specified or it has been improperly specified, the "proper" dowry (i.e. the dowry of a woman of equal status) shall be due.
ii. If divorce takes place before consummation of the marriage and the enjoyment of marital seclusion, then "compensation" shall be due.

Article 62. "Compensation" means such a full set of dress as is worn by a woman of equal status when she goes out of her house. In deciding upon this matter the position of the husband shall be taken into consideration, provided that the compensation shall not exceed half of the "proper" dowry in this instance.

Article 63. If consummation takes place after an irregular marriage contract in which the dowry has not been specified, the woman shall be entitled to the proper dowry. If it has been specified, she will be entitled to either the "specified" or the proper dowry, whichever is less.

Article 64. Where a man who is terminally ill marries specifying a dowry in excess of the proper dowry, the excess will be governed by the rules of "bequests".

**Section II: Residence**

Article 65. The husband shall house his wife in a residence similar to those of her equals.

Article 66. The wife shall, on receipt of her proper dowry, reside with her husband.



Article 67. The husband shall not lodge another wife in the same house with his wife without the latter's consent.

Article 68. Where there are a number of wives, the husband shall provide equal residence for each of them.

Article 69. The husband shall not house any of his relatives with his wife, except his young son below the age of discretion, if it is established that such relatives are detrimental to her.

Article 70. A wife shall be bound to travel with her husband if he wishes that unless it is otherwise stipulated in the marriage contract or the judge finds grounds to prevent her travelling.

**Section III: Maintenance**

*A - Marital Maintenance*

Article 71. i. Maintenance of a wife includes food, clothing, housing and medical care up to the customary standard, and also domestic servants if her peers have servants.
ii. The husband shall be bound to pay the cost of maintenance to his wife if he refrains from maintaining her or if it is found that he falls short of providing her with appropriate maintenance.

Article 72. i. The wife's maintenance shall be due from the husband since the date of the conclusion of a valid marriage contract, even if she were of a different religion and if she continued to live in her family residence, unless the husband asked her to move to him and she refused to do that without justification.
ii. A wife's refusal (to join her husband) shall be considered justified as long as the husband does not pay the prompt portion of the dowry or does not provide her a lawful residence.

Article 73. A wife who works out of the house by day and stays with the husband by night shall not be entitled to maintenance if the husband forbade her to go out of the house and she declined and went out.

Article 74. If the wife becomes recalcitrant, she shall not be entitled to maintenance for the period of her recalcitrance.

Article 75. A "recalcitrant" wife is one who leaves the marital home without lawful grounds, or who prevents her husband from entering her home before she asks to be moved to another home.

Article 76. The maintenance to be paid by the husband to the wife shall be determined in accordance with the financial circumstances of the husband, whether prosperous or straitened, irrespective of the financial circumstances of the wife, provided that it be not less than the minimum to meet her appropriate needs.

Article 77. i. The amount of maintenance may be increased or decreased according to the changes in the husband's circumstances or in the prices (of the necessities of life) in the land.

ii. A claim for increase or decrease of the amount of maintenance once determined shall not be entertained before the expiry of six months after such determination except in exceptional emergencies.

Article 78. i. Maintenance shall be awarded to the wife with effect from the date the husband stopped providing her with the maintenance he was bound to pay.

ii. Maintenance shall not be awarded for more than four months preceding the date the husband had stopped providing her with the maintenance he was bound to pay.

iii. Maintenance shall not be awarded for more than four months preceding the date on which the claim was made.

Article 79. Maintenance determined by the court or by consent shall not be void except on payment thereof or on discharge (by the wife).

Article 80. i. If the court decrees that the husband pay the wife's maintenance and it is impossible for him to do that, the person responsible for her maintenance (if she were presumed to be unmarried) shall be bound to spend on



her to the extent of the decreed amount and shall have the right in turn to be reimbursed by the husband.

ii. If the wife were permitted to take a loan (for her maintenance) from a person not responsible for her maintenance, that person shall have the choice either to claim reimbursement from the husband or to seek repayment from the wife, in which latter case she in turn shall seek restitution from her husband.

Article 81. The judge shall determine the amount of maintenance to be paid. His assessments shall be founded upon proven grounds and he may, at his discretion, consult expert opinion on the matter.

Article 82. i. The judge may, during consideration of the claim for maintenance and following the assessment thereof, order the husband, if necessary, to advance an amount to the wife to be adjusted against the maintenance and not exceeding that of a month's maintenance. The advance may be renewed afterwards.

ii. This order shall be executed summarily like final verdicts.

*B – Maintenance during 'Idda (the mandatory waiting period before remarriage)*

Article 83. A man shall be responsible for the maintenance of his *'idda*-observing wife for the period of the *'idda* whether it is after divorce or separation or dissolution of marriage.

Article 84. The maintenance for the period of *'idda* is like normal marital maintenance and it is to be awarded with effect from the date on which *'idda* became due, and it shall not be awarded for more than nine months.

# Part Two

# DISSOLUTION OF MARRIAGE

CHAPTER 1

# DIVORCE

**Section I: Divorce**

Article 85. i. A man will be fully competent to divorce on completion of eighteen years of age.
ii. The judge may permit a person to divorce, or approve the divorce pronounced by a married adolescent before the age of eighteen if it is found that such divorce will be in the interest of the parties concerned.

Article 86. The "object" of divorce is a woman in the state of a legally valid marriage, or in the course of observing *'idda* upon a "revocable"[1] divorce. Except in these two cases, a divorce will not be valid, even if made revocable.

Article 87. A divorce may be made by spoken words or in writing. A person, who is unable to do either, may divorce by means of a recognised signal on his part.

Article 88. The husband may authorise someone else to divorce on his (the husband's) behalf, or may delegate powers to the wife to divorce herself.

Article 89. i. A divorce made by a person under the influence of intoxication, or in a state of extra excitement, or under duress and compulsion, shall not be effective.
ii. A "person in a state of extra excitement" is one who,

[1] A "revocable" divorce is one in which the man may take the wife back before the expiry of the *'idda* and without any further marriage contract, dowry and witnesses.

because of anger or any other cause has so lost his sense of discretion and discernment that he does not realise what he utters.

Article 90. An un-implemented declaration of divorce shall not be effective if the intention was no more than to impel the wife to do something, or to prevent her from doing something, or if the expression was only a form of oath used to emphasise some statement.

Article 91. The husband has a right to make three declarations of divorce against his wife.

Article 92. A divorce pronounced once by words or by signs, though accompanied by the mention of any number, shall be deemed only one declaration of divorce.

Article 93. A divorce made in such clear and unequivocal words as are used conventionally for the purpose shall be effective, even though made unintentionally. And a divorce made in equivocal expressions which admit of the meaning of either divorce or something else shall only be effective if there is the intention to divorce.

Article 94. All cases of divorce shall be deemed to be revocable except those that have been completed by three specific declarations, or made before consummation of marriage or by a deputy on behalf of someone, and such other cases as have been specifically defined in this statute as a "final" divorce.[2]

**Section II: Mutual Dissolution**[3]

Article 95. i. Mutual dissolution of marriage shall be valid only if the husband is legally competent to divorce and if the woman fulfils the conditions of being a proper "object" of divorce.

ii. A woman who has not attained the age of legal majority when the mutual dissolution takes place shall

[2] That is, a divorce with regard to which it is necessary to conclude a fresh marriage contract, with a fresh stipulation of dowry and fresh witnesses before the wife can be taken back.

[3] That is, a divorce on some consideration paid by the wife to the husband.



not be bound to pay any consideration for the dissolution except where the consent of her financial guardian has been obtained.

Article 96. Each of the two parties may withdraw the offer for dissolution before acceptance by the other.

Article 97. Anything that can be legally pledged may be paid as consideration for the mutual dissolution.

Article 98. If the mutual dissolution is agreed on for a consideration other than the dowry then it shall be paid, and the two parties will be relieved of all the rights and liabilities connected with dowry and marital maintenance.

Article 99. If the two parties do not specify anything at the time of making the dissolution agreement, each party will be freed from the claims of the other in respect of dowry and maintenance.

Article 100. If the two parties to the dissolution specifically disclaim any consideration for it, the dissolution shall be deemed one revocable divorce.

Article 101. The claim for maintenance during the period of the *'idda* shall not lapse nor shall the husband making the dissolution be relieved of the liability to pay it except where it is so stipulated specifically in the dissolution agreement.

Article 102. i. If the dissolution agreement specifically exempts the husband from the payment of any recompense for the suckling of the child, or if it is laid down that the mother will retain and maintain the child for a specified period, and if (before the expiry of that period) she marries or leaves the child or dies, or the child dies, then the husband shall be entitled to reimbursement to the extent of the cost of suckling the child or of maintaining him for the remainder of the specified period.

ii. If the mother was insolvent at the time of the dissolution or became so afterwards, the father shall be bound to maintain the child and the cost of such maintenance shall be a debt upon the mother due to him.

Article 103. If the man stipulates in the dissolution agreement that he will retain the child with him for the period of his upbringing, the dissolution is valid but the condition is void and the legal custodian (mother) has her right to take the child from the father and the latter is bound to pay the cost of the child's nursing and upbringing if the child was poor.

Article 104. The cost of the child's maintenance due from the father shall not be set off against the custodian's (mother's) debt due to the father.

## CHAPTER 2

# SEPARATION

### Section I: Separation on the Grounds of Illness

Article 105. The wife may claim separation from the husband under the following two circumstances:

i. If the husband suffers from any of those diseases that prevent consummation of the marriage, provided that she herself is free from such diseases.

ii. If the husband becomes insane after the marriage.

Article 106. i. The woman's right to claim separation on the grounds of illness as explained in the foregoing article shall lapse if she knew about it before the marriage or if she signified her assent and resignation to it after the marriage.

ii. The right to claim separation on the grounds of impotence shall by no means lapse.

Article 107. If the diseases mentioned in Article 105 are incurable, the judge shall immediately give the order for the couple's separation; but if the diseases are curable he shall postpone the determination of the claim for separation for an appropriate period not exceeding a year. If the disease is not cured by that time he shall give the order for their separation.

Article 108. Separation on the grounds of illness shall be considered a final divorce.

### Section II: Separation on the Grounds of Absence (of the Husband)

Article 109. i. If the husband remains absent without reasonable

excuse, or if he has been sentenced to imprisonment for more than three years, the wife may, after the expiry of one year of such absence or imprisonment, apply to the judge for an order of separation even though the husband has enough wealth with which the wife can maintain herself.

ii. Such separation shall be deemed a revocable divorce; so that if the absentee returns or the prisoner is released while the woman is still in the process of completing her *'idda*, he has the right to take her back.

### Section III: Separation on the Grounds of Failure to Provide Maintenance

Article 110. i. The wife may apply for an order of separation if the husband, while present, refrains from maintaining her and has no visible resources, nor has his inability to maintain her been established.

ii. If he proves his inability to maintain or if he is absent, the judge shall grant him a suitable period of respite not exceeding three months. If after that the man does not provide maintenance, the judge shall give the order for their separation.

Article 111. A judicial separation on the grounds of failure to provide maintenance shall be effective as a revocable divorce, so that the husband is entitled to take back his wife while she is still in the process of completing her *'idda*, provided that he proves his financial ability and is prepared to maintain her.

### Section IV: Separation on the Grounds of Dissension and Discord between the Couple

Article 112. i. If one of the couple alleges being harmed and maltreated by the other to such an extent that it makes continuation of conjugal life with the other impossible, he or she may apply to the judge for an order of separation.

ii. If the allegation of harm and maltreatment is proved and the judge is unable to effect reconciliation, he shall



give the order for separation. Such separation shall be considered a final divorce.

iii. If the allegation of maltreatment and harm is not proved, or if the plaintiff is the husband, the judge shall postpone the adjudication of the case for a period of not less than a month in the hope of reconciliation. If the plaintiff still continues to press the allegation and no reconciliation takes place, the judge shall appoint two arbitrators from among the relatives of the couple, or such other persons as in between the two, taking oaths from them (the arbitrators) to the effect that they shall perform their duty with impartiality and honesty.

Article 113. i. It shall be the duty of the two arbitrators to investigate and ascertain the causes of discord between the husband and the wife and to bring them together at a meeting under the supervision of the judge, which will not be attended by anyone else except the husband and the wife and such others as the two arbitrators decide to invite.

ii. Abstention of either the husband or the wife from attending the meeting after having been served with notice to attend it shall not affect the arbitration of the case.

Article 114. i. The two arbitrators shall make their best efforts to effect reconciliation between the couple. If they fail to bring about reconciliation and if the fault or the major part of it lay with the husband, they shall decide upon a separation by a final divorce.

ii. If the fault or its major part lay with the wife, they (arbitrators) shall decide upon a separation between the two on full or partial repayment of the dowry by the wife, provided that she pay it before the judge passes his orders for separation.

iii. If the two arbitrators disagree, the judge shall appoint other arbitrators or shall co-opt a third arbitrator with them who shall have the casting vote and shall take the oath.

Article 115. It shall be the duty of the arbitrators to submit their report to the judge without being required to give the

excuse, or if he has been sentenced to imprisonment for more than three years, the wife may, after the expiry of one year of such absence or imprisonment, apply to the judge for an order of separation even though the husband has enough wealth with which the wife can maintain herself.

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iii. If the two arbitrators disagree, the judge shall appoint other arbitrators or shall co-opt a third arbitrator with them who shall have the casting vote and shall take the oath.

Article 115. It shall be the duty of the arbitrators to submit their report to the judge without being required to give their

reasons, and the judge shall pass orders in accordance with the report if it conforms to the rules in this section.

**Section V: Arbitrary Divorce**

Article 116. If anyone who is terminally ill or in such a state of health as is most likely to cause death commits willfully, without his wife's consent, an act of irrevocable divorce and then dies of that illness or in that state of health while the woman is still in the process of completing her *'idda*, she will inherit from him provided that her competence to inherit continued from the time of the act of divorce till the man's death.

Article 117. If the husband divorces his wife and then it becomes clear to the judge that the husband did so arbitrarily without any reasonable grounds and that the wife will consequently be in a state of utter misery and destitution, the judge may pass orders upon the husband, according to the state and degree of his arbitrariness, to pay compensation to the wife not exceeding an amount equivalent to the cost of maintenance for a woman of equal status, in addition to the maintenance for the period of the *'idda*. The judge may order for the payment of the compensation in full at a time or by monthly instalments, according to the needs of the circumstances.

CHAPTER 3

# THE EFFECTS OF DISSOLUTION OF MARRIAGE

**Section I: Its Effects on Marital Status**

Article 118. i. A revocable divorce does not put an end to the state of marriage, so that the husband may take his divorced wife back by word or deed during the period of *'idda*. This right does not lapse by default.

ii. The woman shall be finally divorced and the right to revoke shall lapse with the expiry of the *'idda* of a revocable divorce.

Article 119. A final divorce which is less than a "triple divorce", shall instantly extinguish the status of marriage but shall not bar a renewal of the contract of marriage.

Article 120. A divorce completed by triple declarations shall instantly extinguish the status of marriage and shall bar a renewal of the contract of marriage unless the conditions set forth in Article 36 of this law have been complied with.

**Section II: *'Idda* (the mandatory period of waiting before remarriage)**

Article 121. In the case of divorce or annulment (*faskh*)[4] the *'idda* of

[4] That is, separation on the grounds of irregularity in marriage or cohabitation in consequence of a marriage contracted through an innocent error. The distinction between "divorce" and "annulment" is that the former means putting an end to the marriage and all the previous rights of dowry and in it possibly taking place three times, which cannot be the case except in the state of a valid marriage.

reasons, and the judge shall pass orders in accordance with the report if it conforms to the rules in this section.

**Section V: Arbitrary Divorce**

Article 116. If anyone who is terminally ill or in such a state of health as is most likely to cause death commits willfully, without his wife's consent, an act of irrevocable divorce and then dies of that illness or in that state of health while the woman is still in the process of completing her *'idda*, she will inherit from him provided that her competence to inherit continued from the time of the act of divorce till the man's death.

Article 117. If the husband divorces his wife and then it becomes clear to the judge that the husband did so arbitrarily without any reasonable grounds and that the wife will consequently be in a state of utter misery and destitution, the judge may pass orders upon the husband, according to the state and degree of his arbitrariness, to pay compensation to the wife not exceeding an amount equivalent to the cost of maintenance for a woman of equal status, in addition to the maintenance for the period of the *'idda*. The judge may order for the payment of the compensation in full at a time or by monthly instalments, according to the needs of the circumstances.

CHAPTER 3

# THE EFFECTS OF DISSOLUTION OF MARRIAGE

**Section I: Its Effects on Marital Status**

Article 118. i. A revocable divorce does not put an end to the state of marriage, so that the husband may take his divorced wife back by word or deed during the period of *'idda*. This right does not lapse by default.

ii. The woman shall be finally divorced and the right to revoke shall lapse with the expiry of the *'idda* of a revocable divorce.

Article 119. A final divorce which is less than a "triple divorce", shall instantly extinguish the status of marriage but shall not bar a renewal of the contract of marriage.

Article 120. A divorce completed by triple declarations shall instantly extinguish the status of marriage and shall bar a renewal of the contract of marriage unless the conditions set forth in Article 36 of this law have been complied with.

**Section II: *'Idda* (the mandatory period of waiting before remarriage)**

Article 121. In the case of divorce or annulment (*faskh*)[4] the *'idda* of

[4] That is, separation on the grounds of irregularity in marriage or cohabitation in consequence of a marriage contracted through an innocent error. The distinction between "divorce" and "annulment" is that the former means putting an end to the marriage and all the previous rights of dowry and in it possibly taking place three times, which cannot be the case except in the state of a valid marriage.

a woman who is not pregnant shall be as follows:
i. Three complete menstruations for a woman who menstruates. A woman's claim of having completed the *'idda* shall not be entertained before the expiry of three months after divorce or annulment.
ii. One full year for a woman who is free from menstruation for a long period and who has not had menstruation or had it before but it has stopped since then and she has not attained the age of having despaired of menstruation.[5]
iii. Three months for those who have attained the age of having despaired of menstruation.

Article 122. The *'idda* in the case of an irregular marriage in which consummation has taken place shall be governed by the rules laid down in the preceding article.

Article 123. The *'idda* of a woman whose husband has died shall be four months and ten days.

Article 124. The *'idda* of a pregnant woman shall run till she gives birth to the child or miscarries it at a stage when the foetus has visibly developed some organs.

Article 125. The *'idda* shall start running from the date of divorce or death or annulment or judicial separation or separation in consequence of an irregular marriage.

Article 126. The *'idda* shall not be obligatory before consummation of marriage or before the enjoyment of marital seclusion except in the case of death.

Article 127. i. If the husband dies while the wife has been observing *'idda* after a revocable divorce, she shall revert to the state of *'idda* performed after death and the period she has previously completed shall not be counted.
ii. If the husband dies while the wife has been observing *'idda* after a final divorce, she shall observe the *'idda* either of death or of final divorce, whichever is longer.

Annulment, on the other hand, means invalidation of the marriage *ab initio*, and it is not counted in terms of the number of divorce declarations.

5 That is, when the woman has despaired of menstruation, which is fifty-five years of age.

# Part Three

# BIRTH AND ITS CONSEQUENCES

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# Part Three

# BIRTH AND ITS CONSEQUENCES

CHAPTER I

# PARENTAGE

## Section I : Parentage in the Case of Valid Marriage

*A - Parentage of a Child Born in a Valid Marriage*

Article 128. The minimum period of gestation is one hundred and eighty days, and the maximum one astronomical year.

Article 129. i. The child of a wife in a valid marriage shall be regarded as her husband's on the two following conditions:

a. That the minimum period of gestation must have expired since the date of the marriage contract; and

b. That non-cohabitation between the spouses has not been proved by tangible evidence, as when either of them has been imprisoned or has been away from the other in a remote land for more than the period of gestation.

ii. When either of these two conditions is lacking, the child's lineage from the husband shall not be established unless he acknowledges it or claims it.

iii. Where both these conditions are fulfilled the child's lineage from the husband shall not be denied except by *li'aan*[1] (his sworn allegation of his wife's adultery).

[1] *Li'aan* means, when a husband claims that his wife's child is not his, that both the husband and the wife take an oath before the judge according to a specified formula, the husband swearing four times in the name of Allah that he is telling the truth, and on the fifth time saying that Allah's curse shall befall him if he is lying; while the wife swears in the name of Allah and says four times that her husband is telling a lie about her and, in the fifth time, saying that Allah's

## Section II: Parentage of a Child Born of an Irregular Marriage or of a Marriage Contracted and Consummated through an Innocent Error

Article 130. i. The parentage of a child born of an irregular marriage which has been consummated shall be traced to the husband if born after one hundred and eighty days or more from the date of consummation of the marriage.

ii. If a child is born after voluntary or involuntary separation, his descent shall not be traced to the husband if not born within a year of the date of separation.

Article 131. i. When a woman who has had sexual intercourse through error[2] gives birth to a child between the minimum and the maximum period of gestation, the descent of the child shall be traced to the cohabitant.

ii. Parentage once established even though the marriage be irregular or erroneous, shall entail all the consequences of kinship such as prohibition of marrying within the forbidden degrees, and the rights and duties of maintenance for kin and of inheritance.

## Section III: Acknowledgement of Parentage

Article 132. i. Acknowledgement of parentage for a person of unknown parentage, even if made during terminal illness, establishes the parenthood of the person who thus acknowledges, provided the difference of age between the two makes it possible.

ii. If the person who thus acknowledges is a married woman, or a woman in *'idda*, the child's lineage shall not be traced to the husband except by his confirmation or by evidence.

Article 133. If a person of unknown parentage acknowledges

curse shall befall her if he (the husband) was telling the truth. The judge then orders their immediate and irrevocable separation and the child is attributed to his mother alone.

[2] That is, a woman who has been cohabited with under a mistaken impression of the legality of such intercourse with her without knowledge of its being in fact illegal, as when a man marries a woman and then after consummation comes to know that she is his foster sister.



*someone as his father or mother, his (the person who thus acknowledges) parentage will be established if the person so acknowledged confirms it and if the difference of age between the two makes it possible.*

*Article 134. Acknowledgement of kinship other than sonship, paternity or maternity shall not apply to a person other than the person who thus acknowledges except by that other person's confirmation.*

## CHAPTER 2

# CUSTODY

Article 135. To be competent to have custody of a child, a person must have attained the age of legal majority, must be mentally sound and must be capable of bringing the child up both physically and morally.

Article 136. Where a woman having the custody of a child becomes married to a person not related to the child within the prohibited degrees, she loses her right to custody.

Article 137. The right of custody devolves, in order, upon the mother, her mother how high soever, the father's mother how high soever, the full-sister, the half-sister on the mother's side (uterine sister), the half-sister on the father's side (consanguine sister), the full-sister's daughter, the daughter of the uterine sister, the daughter of the consanguine sister, the aunts on the mother's side, the aunts on the father's side in this order, and the male agnates in the order of inheritance.

Article 138. Where there are a number of persons equally entitled to have custody of the child, the judge shall have discretion to choose the one most suitable for the child.

Article 139. The right of custody shall be regained if the reason for its loss ceases to exist.

Article 140. Remuneration for bringing up the child during the period of custody shall be paid by the person responsible for the child's maintenance, but the amount of such remuneration shall not exceed half the cost of maintenance.

Article 141. The mother shall not be entitled to any remuneration for custody during the continuance of marital life (with the child's father) nor for the period of *'idda* on divorce.

Article 142. Where the person responsible for paying the remuneration for custody is financially insolvent and unable to pay it, and one of the child's relatives within the prohibited degrees volunteers to have custody of the child, the custodial mother has the choice either to keep the child without remuneration or to surrender him to the relative who has so volunteered.

Article 143. If the woman becomes recalcitrant[3] and the children are over five years of age, the judge shall have the power to place them under the custody of either of the spouses he likes, provided that in so doing the judge takes the children's welfare into consideration and bases his decision on some cogent grounds for that purpose.

Article 144. i. The period of custody ends, in the case of a boy, when he completes seven years of age, and in the case of a girl, when she completes nine years of age.

ii. Where it is proved that the guardian, even if he is the father, is not reliable for the minor boy or girl, they shall be handed over to the person next in the order of guardianship.

Article 145. The judge may permit a woman to retain the custody of a minor son till he completes nine years of age and of a minor girl until she is eleven.

Article 146. i. A mother may not, during the continuance of marital life, take the child away with her except with his father's consent.

ii. On the expiry of the period of her *'idda* she may take away the child without the father's consent to her own country where the contract of her marriage was made.

Article 147. Where the custodian is a woman other than the mother, she may not take away the child except with his guardian's consent.

3 See Article 75 for the meaning of recalcitrance.



Article 148. The father may not take away the child during the period of his custody except with the consent of his custodian.

Article 149. The guardian of a woman who is within the prohibited degrees may place her within his household if she is under forty, even if she is not a virgin. If she declines to obey him without valid reason, he will not be responsible for her maintenance.

CHAPTER 3

# FOSTERAGE

Article 150. i. Remuneration for suckling the baby shall be paid by the person responsible for his maintenance and it shall be regarded as the equivalent of his feeding costs.

ii. The mother shall not be entitled to any remuneration for suckling the child as long as she still has marital status or while she is in her *'idda* from a revocable divorce.

Article 151. A woman may volunteer to suckle the child where the mother demands remuneration and the father is impoverished, provided that the suckling is done at the mother's house.

CHAPTER 4

# MAINTENANCE OF RELATIONS

Article 152. Every person's maintenance is to be paid with his own money, except the wife whose maintenance is to be paid by the husband.

Article 153. i. Where a child has no money of his own, the father is responsible for his maintenance, unless the father is indigent and incapable of maintaining the child and of earning a living on account of a physical or mental handicap.

ii. Responsibility for maintenance of children continues, in the case of a female ward till she marries and in the case of a male ward till he reaches the age at which his peers earn a living.

Article 154. i. Where a father is incapable of maintaining his children without being incapable of earning, the person who would have been responsible for their maintenance had the father not been there shall be charged with that responsibility.

ii. The cost of such maintenance will be a debt upon the father due to the person so paying the maintenance and the latter shall have the right to be repaid if the father becomes financially solvent.

Article 155. i. A father shall not be required to maintain his daughter-in-law unless he undertakes to do so.

ii. In this case the maintenance paid by the father shall be a debt upon the son to be repaid by him when he becomes financially solvent.

Article 156. A well-to-do child, whether male or female, major or minor, is bound to maintain his poor parents even when they are capable of earning a living, unless the father is evidently obstinate and, out of laziness and stubbornness, prefers unemployment to doing the work done by people like him.

Article 157. The maintenance of every poor person who is incapable of making a living due to physical or mental handicap shall be the responsibility of his financially solvent relatives who are entitled to inherit from him in proportion to their shares in his inheritance.

Article 158. In the case of difference of religion, maintenance is due only to ascendants and descendants.

Article 159. Maintenance of kin shall be awarded from the date the claim was made.

# Part Four

# CAPACITY AND LEGAL REPRESENTATION

CHAPTER I

# OBJECTIVE RULES

Section I: General Principles

Article 160. A minor means a person who has (not) attained the legal age of majority which is eighteen.

Article 161. i. Legal representation on behalf of another person may be either natural guardianship or executorial guardianship or custodial guardianship or court-appointed guardianship.

ii. Natural guardianship arises from blood-relationships such as that of the father etc. Executorial guardianship is exercised over orphans. Custodial guardianship is exercised over the insane, persons of unsound mind, mentally retarded persons, fools and simpletons;[1] and court-appointed guardianship relates to missing persons.

iii. Executorial (*wisaya*), custodial (*qiwama*) and court-appointed guardianship may each be either general or specific, permanent or temporary.

iv. Natural guardianship terminates on the minor's attaining eighteen years of age provided that before that the continuation of guardianship over him has not been ordered by the court in view of any reason limiting legal competence; or when he attains that age but is insane or of unsound mind, in which case the guardianship over him shall continue without orders from the court.

[1] That is, those who misuse their properties, see Article 197, paragraph iii.

## Section II: Legislation Pertaining to Minors

Article 162. i. A minor may take possession of his property before he attains the legal age of majority.
ii. The judge may, on the minor's attaining fifteen years of age and on hearing the executor's statement, allow the minor to take possessions of a part of his property for the purpose of managing it.
iii. If the judge once refuses an application for permission (to take possession of the property), he shall not be entitled to review it before the expiry of one year from the date of refusal.

Article 163. i. An authorised minor is entitled to undertake managerial activities and matters arising out of them, like the selling of products and the buying of equipment.
ii. He shall not be entitled, without the agreement of the judge, to conduct trade or to conclude a lease contract for a period exceeding one year nor is he entitled to remit a right or to pay off a debt not related to managerial activities.
iii. Likewise he shall not be entitled to consume any portion of his net income except what is necessary for his maintenance and the maintenance of those whom he is legally bound to maintain.

Article 164. The authorised minor shall be deemed to possess full capacity within the limits of authorisation and to file a suit for the same in a court of law.

Article 165. i. A minor authorised to manage the property shall submit annual accounts to the judge.
ii. The judge will elicit the opinion of the guardian or executor while reviewing the account and will order the surplus income to be deposited in the government treasury or in any bank of his choice.
iii. No part of the money thus deposited in pursuance of the judge's order shall be withdrawn except with his permission.

Article 166. i. The minor, on attaining thirteen years of age, shall have the right to manage his self-earned property.





ii. The minor shall not be held responsible for his debts arising out of such management of the property except to the extent of that property.

## Section III: Guardianship of the Minor's Person and Property and its Termination

*A- Guardianship of Persons*

Article 167. i. The father and, after him, the true grandfather have a right to guardianship of the minor's person and his property and they are under an obligation to act as such.
ii. Excepting the two above mentioned persons, other blood relations have a right, according to the order specified in Article 21, to the guardianship of the minor's person, but not of his property.
iii. Guardianship of the minor's person includes the power of disciplining, providing medical care, education, occupational guidance and consent for marriage, and all other matters relating to the well-being of the minor's person.

Article 168. Where a person making a gift of some property to the minor stipulates that his executor shall not operate it, the court shall appoint a special executor for such property.

*B- Guardianship of Property*

Article 169. i. The father and, in his absence, the true grandfather, and no one other than these two, have the right of guardianship over the minor's property, for the purpose of safeguarding, administering and putting it to profitable use.
ii. The minor's property shall not be wrested from the possession of the father or the true grandfather unless a breach of trust or misapplication of the property has been proved; nor shall either of the two be eligible for giving the minor's property or its use away nor to sell or mortgage his immovable property, except with the judge's permission on valid grounds.

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Article 170. If the minor's property is exposed to danger due to the guardian's malpractice or due to any other reason, or if its loss is apprehended, the court may terminate his guardianship or put restrictions on it.

Article 171. If the guardian is deemed to be missing or if limitation has been placed on his legal competence, or if he has been detained in prison and his detention has jeopardised the minor's interests, the guardianship will remain suspended and a temporary guardian will be appointed if no other guardian of the minor exists.

Article 172. The court shall appoint a special executor where there is a clash of interests between the minor and his guardian or where the interests of the minor clash with one another.

**Section IV: Executor-Guardian**

*A – Executor-Guardian of the Minor's Property*

Article 173. i. The father, and in his absence the grandfather, may appoint an executor-guardian of his choice for his minor son or for the child in the womb. He is also entitled to revoke the appointment.

ii. After death, the appointment of the executor-guardian shall be submitted to the court for confirmation.

Article 174. If a minor or a child in the womb has no executor-guardian selected for him, the court shall appoint an executor-guardian.

Article 175. i. The executor-guardian must be a person of good reputation and honourable record, capable of discharging his duties as executor, possessing full legal capacity and of the same religion as the minor.

ii. An executor-guardian must not be someone:

a. Convicted by the court for the crime of theft or breach of trust or forgery or any crime related to the violation of the ethical code and public morality.

b. Declared a bankrupt, till his creditability is restored.

c. A person whose appointment as guardian has been opposed by the father or, in his absence, by the



grandfather before their deaths, if such opposition is proved by written evidence.

d. A person with whom or with anyone of whose ascendants or descendants or spouse the minor has had litigation in court or a family dispute on account of which there is reason to fear that his interests might be harmed.

Article 176. If the interests of the minor come in conflict with those of the executor-guardian, or of his spouse or any of his ascendants or descendants or of those whom he represents, the judge may appoint a special temporary executor-guardian, provided the nature of the conflict does not reach the level of the conflict specified in the foregoing article.[2]

*B – Capacity of Executor-Guardians*

Article 177. Donations out of the minor's property by the executor-guardian shall be void.

Article 178. Where the minor owns a share in an undivided piece of real estate, the executor may, with the permission of the court, carry out the apportionment thereof with the consent of the rest of the sharers, provided that such apportionment shall not be effective except after confirmation by the judge.

Article 179. The executor is not entitled, unless permitted by the court, to do the following:

i. To dispose of the minor's property by means of sale or purchase or barter or partnership or lending or pledging or any other kind of disposition involving transfer of ownership or giving rise to any specific rights.

ii. To transmit debts due to the minor and to accept bills of exchange on it.

[2] Because where a conflict of interests between the minor and his executor or his relatives reaches the stage of a litigation in court of a family dispute on account of which there is reason to fear that the minor's interests might be harmed, it is necessary to appoint a new executor-guardian, and not a special and temporary executor-guardian.

iii. To put the minor's property to profitable use or get it liquidated or to give it away as loan.
iv. To let on lease the minor's immovable property for more than three years in the case of agricultural lands and for more than one year in the case of buildings.
v. To let on lease the minor's immovable property for a term exceeding by one year the time of the minor's attaining the legal age of majority.
vi. To accept a conditional gift or to refuse the same.
vii. To disburse funds out of the minor's property to those whom he is liable to maintain except when such maintenance has been decreed and confirmed by the court.
viii. To effect reconciliation or arbitration.
ix. To redeem the liabilities on the deceased's estate or on the minor unless ordered and confirmed by the court.
x. To file suits in a court of law except where delay in doing so entails harm to the minor or involves loss of his rights.
xi. To withdraw any lawsuit or to surrender the minor's right to institute judicial proceedings.
xii. To enter into a contract with advocates in a lawsuit on behalf of the minor.
xiii. To effect an alternation in the contracts of insurance or to modify the same.
xiv. To take on lease the minor's property or to let the same on lease to himself or his spouse or any of his relatives or in-laws up to the fourth degree or to anyone whom the executor-guardian represents.
xv. To pay the expenses of the minor's marriage.

C – *Duties of the Executor-Guardian*

Article 180. i. If the executor-guardian finds on the eve of the minor's attaining eighteen years of age that he is insane or mentally retarded or that his property will not be secure in his hands even though he attains that age, it shall be his (the executor's) duty to inform the court by



a formal application so that it may consider continuing the guardianship.
ii. The court shall decide the matter according to documents after hearing the minor and carrying out a judicial inquiry and medical examination.

Article 181. i. The executor-guardian shall deposit in the minor's name, in the state treasury or in a bank approved by the court, all that he receives of the minor's cash together with any such things the court considers necessary to deposit, like documents and ornaments and such other things within fifteen days of receipt thereof, and shall not draw anything out of these except with the judge's permission.
ii. Before depositing these, the expenses of administration and the settled amount of maintenance for a month may be kept out of them.

Article 182. The executor-guardian shall submit annual accounts supported by documents consistent with the rules laid down in this statute.

Article 183. The court may require the executor-guardian to provide such security as it determines, the cost of which shall be the responsibility of the minor.

Article 184. i. An executor-guardian of the minor's property shall not receive any fees, except where the court, on the executor's application, decides to assign fixed fees for him or to pay remuneration for specified work.
ii. It shall not be lawful to appoint fees for any period previous to the application.

Article 185. i. If the court finds reason to suspend the executor-guardian's function, it will appoint a temporary executor for the management of the minor's property till the reason for the suspension disappears or a new executor-guardian is appointed.
ii. The rules of executor-guardianship laid down in this statute shall apply to the temporary executor-guardian.

*D. Termination of the Executor-Guardian's Functions and Responsibilities*

Article 186. The function of the executor-guardian shall terminate in the following circumstances:

i. On the minor's death.

ii. On his attaining eighteen years of age except where the court, before his attainment of that age, decides to continue the guardianship over him, or when he attains that age while he is of unsound mind or insane.

iii. On reversion of guardianship to the father or grandfather.

iv. On completion of the work for which a special executor-guardian was appointed, or expiry of the period for which a temporary executor-guardian was appointed.

v. On acceptance of his resignation.

vi. On the cessation of his competence.

vii. If he is missing.

viii. On his being dismissed.

Article 187. i. The executor-guardian shall be dismissed in the following circumstances:

a. If any of the grounds for exclusion from executor-guardianship as laid down in Article 175 of this statute is found in him.

b. If he has been sentenced to confirmed imprisonment for more than one year during the period of his executorship, being convicted for other crimes.[3] In this case it will suffice for the judge to appoint a temporary executor-guardian.

c. If the court finds in his activities or negligence anything which jeopardises the minor's interests or if any treachery is detected in his (the executor's) accounts.

ii. The dismissal shall be effected after investigation and a hearing of the executor-guardian and the person seeking the dismissal.

[3] That is, offences other than those mentioned in Article 175.



Article 188. i. An executor-guardian whose guardianship has expired shall make over, within thirty days of the expiry, all properties in his custody and shall submit an account of them, supported by documents, to his successor or to the minor, if he has attained the age of legal majority, or to his heirs, if he is dead; he shall also submit a copy of the accounts to the court and to the supervisor, if any.

ii. If the executor-guardian dies or is debarred from exercising his function or if he is missing then his heirs or their representatives shall surrender the minor's properties and shall submit an account of them.

Article 189. Any executor-guardian whose guardianship has expired and who has refrained without reason from surrendering the minor's properties to the person who has stepped into his place of guardianship, within the period prescribed in the foregoing Article, shall have his case referred to the Public Prosecutor at a day's notice before instituting proceedings against him for breach of trust.

Article 190. i. If the executor-guardian fails to perform any duties imposed on him in accordance with this statute, he shall be responsible for any damage befalling the minor due to such remissness and shall be accountable as his agent.

ii. The judge may compel him to pay compensation to the minor, may deprive him (the executor) of his fees, in full or in part, may dismiss him, or may impose on him any one of these penalties, and that in addition to his responsibility as stipulated in the preceding paragraph. The executor-guardian may be exempted from all or some of these penalties if he makes good the loss caused by his negligence.

Article 191. Any undertaking, remission of debt or settlement obtained by the executor-guardian from the minor who has attained the age of legal majority before final settlement of the accounts shall be null and void.

Article 192. The executor-guardian of a child in the womb shall report to the court the birth or stillbirth of the child, or of the expiry of the period of gestation without birth.

His executorship of the newborn will continue as long as the court does not appoint another guardian.

*E – The Supervisor (Naazir): His Duties and Responsibilities*

Article 193. A supervisor may be appointed along with a selected executor-guardian or with an executor-guardian appointed by the judge.

Article 194. i. The supervisor will watch the executor-guardian's management of the minor's affairs and shall report to the judge about anything which the minor's interests require to be brought to the judge's notice.

ii. The executor-guardian shall submit to the supervisor any explanation which he seeks about the management of the minor's properties and shall enable him to scrutinise the records and documents relating to those properties.

Article 195. i. The supervisor shall, in the event of the executorship falling vacant, immediately ask the court to appoint a new executor-guardian.

ii. Until the new executor-guardian takes up his assignment, the supervisor shall of his own accord transact those matters the delay of which would harm the minor's interests.

Article 196. i. Whatever rules are applicable to the executor-guardian in respect of appointment, dismissal, acceptance of resignation, salary and responsibility for negligence shall also apply to the supervisor.

ii. The office of supervisor shall terminate with the termination of the executor-guardianship, subject to the requirements of the preceding Article.

**Section V: Caretaker Guardianship (*Qiwama*)**

Article 197. i. Insane persons and persons of unsound mind are *ipso facto* incompetent and each of them shall be placed under a custodial guardian by an instrument of appointment.

ii. Simpletons and fools are incompetent when so declared judicially, but their acts before such judicial declaration shall be effective. Each of them shall be placed under a custodial guardian by the same order which declares them incompetent or by a separate instrument.

iii. A "fool" (*safih*) is someone who squanders and wastes his property and misapplies it in a way similar to what is considered "squandering".

iv. A "simpleton" (*mughaffal*) is a person who is negligent and careless in his receiving and disbursing and due to his imbecility does not know how to take care of his affairs.

Article 198. The judge may allow a person declared incompetent on the grounds of "foolishness" or "stupidity" to take possession of a part of his property for managing it, and he shall be governed by the rules applicable in respect of an authorised minor.



**Section VI: Court-Appointed Guardian**

Article 199. A "missing person" is one of whom it is not known whether he is alive or dead, or one who is known to be alive but his whereabouts are unknown.

Article 200. A person who is absent and is prevented by insurmountable circumstances from returning to his place or from managing his affairs himself or through an agent for a period exceeding one year as a result of which his own interests or the interests of others have been paralysed, shall be deemed a missing person.

Article 201. Where the missing person has left behind an agent of his, the court will confirm him as such if he satisfies the conditions required for one's being appointed an executor-guardian, or else it will appoint a guardian (court-appointed guardian) for the missing person.

Article 202. A missing person will cease to be "missing" if he returns or dies or is declared dead on his having attained the age of eighty.

Article 203. The rules regarding the executor-guardian shall apply to the caretaker guardian and the court-appointed guardian except what is explicitly excluded.

# Part Five

# BEQUESTS

CHAPTER 1

# GENERAL PROVISIONS

## Section I: The Essentials and the Validity of Bequests

Article 204. "Bequest" means the disposition of property which takes effect after death.

Article 205. A bequest may be made verbally or in writing. If the testator is incapable of both, the bequest may be made by an intelligible gesture on his part.

Article 206. To be valid, a bequest must consist of a thing not prohibited in law.

Article 207. i. A bequest *in futuro* shall be valid; so shall a bequest subject to or tied to a condition, provided the condition is in itself valid.

ii. A "valid" condition is one in which there is some lawful benefit for the legator or for the legatee or for others and which is not prohibited by law, nor is it repugnant to the objectives of the law (*shari'ah*).

iii. This condition shall be complied with as long as the desired benefit materialises.

iv. Where a bequest is tied to an invalid condition,[1] the bequest shall be valid, but the condition shall be void.

Article 208. i. A legator must be a person legally competent to make a gift.

ii. Provided that if he has been declared incompetent on

[1] As for instance, a bequest is made to a person on condition that he should not marry.

the grounds of stupidity or foolishness, his bequest shall be valid only with the judge's approval.

Article 209. A legatee must be:
i. Known; and
ii. Alive at the time of the execution of the will and at the time of the testator's death, if specified.[2]

Article 210. i. A bequest made in the way of Allah and for charitable purposes without specifying the objects shall be applied for general charitable purposes.
ii. A bequest for places of worship, benevolent and academic institutions and public welfare in general, will be applied for their buildings, their benevolent purposes, for destitute persons and for such other objects, if the manner of its application has not been specified by custom or evidence.

Article 211. A bequest made in favour of a specified charitable object to come into existence in the future will be valid. If the object does not come into existence the bequest shall be applied for the object nearest in kind to that specified object.

Article 212. i. Bequests to persons shall be valid notwithstanding differences in religion and sect between the legator and the legatee.
ii. If the legatee is an alien, it shall be dealt with on the basis of reciprocity.

Article 213. The subject of the bequest shall be:
i. Capable of being transferred after the testator's death and be legally valuable;[3] and
ii. Existing in the testator's possession at the time of execution of the will, if the time itself is defined.

Article 214. Bequest of inheritable rights is valid, including the usufruct of the corpus of a leased property after the lessee's death.

Article 215. A bequest to lend a specified amount of property to

[2] As for instance, the bequest is made to a particular natural person.
[3] That is, something which has value in the eye of law, and this excludes wine and pigs, for they have no value in the eye of law.



the legatee will be valid. If it exceeds one-third of the deceased's (net) estate, the excess shall not be given effect to unless consented to by the heirs.

Article 216. i. If a person during his lifetime allocates specific parts of his property proportionate to each one's share in the inheritance to all or some of his heirs, and afterwards makes a will for the execution of such allocation, it will be valid and will be binding after his death.
ii. If the portion specified for any one of them is in excess of his share in the inheritance, it shall be governed by the rule regarding bequest to heirs.

## Section II: Invalidation and Revocation of Bequests

Article 217. A bequest becomes invalid if:
i. The testator becomes permanently[4] insane[5] and dies in that state.
ii. The legatee dies before the testator's death.
iii. The specific subject of the bequest is destroyed before the testator's death.
iv. The legatee rejects the legacy after the testator's death consistent with what is specified in the following section.
v. If the testator explicitly or implicitly revokes the bequest.[6]

Article 218. Revocation of a bequest means any act or conduct on the testator's part which is proved by evidence or custom as revocation unless the testator explicitly stated that he did not intend to make a revocation.

Article 219. Denial of having executed a will shall not be deemed a revocation of it;[7] nor any act which makes such an addition to the legacy without which it could not be made over.

[4] That is, continuous insanity without interruption.
[5] After having made the bequest in a state of sound mind.
[6] For instance, by selling the specific subject of the bequest.
[7] Because the denial of a bequest after it has been proved is a downright falsehood and it would be void as a false acknowledgement.

Article 220. The following shall bar the rights to the compulsory or optional legacy:
i. If the testator is intentionally killed by the legatee, whether as principal or accessory, provided the killing was without any right or excuse and the killer was sane and had reached fifteen years of age.
ii. If the legatee willfully is the cause of the killing of the testator. Tendering false testimony against the testator leading to his being killed shall be deemed an act of willful causation of homicide.

Article 221. If a bequest is void or if the legacy is rejected in full or in part, the invalidated part shall revert to the testator's inheritable estate.

Article 222. A bequest for an unspecified object does not require acceptance nor is it avoided by the rejection of any-one.

**Section III: Acceptance and Rejection of Legacy**

Article 223. A bequest to a natural person stands rejected when he rejects it, provided he is fully competent at the time of the testator's death.

Article 224. i. To be admissible, a rejection must have been made after the testator's death and within thirty days of it or from the time the legatee came to know of the legacy if he did not know of it at the time of the testator's death.
ii. If this period expires while the legatee remains silent after knowing about the legacy, or dies within the period but making no rejection, even though he did not know about the legacy, it shall be deemed as having been accepted.

Article 225. i. A rejection may be made in part.
ii. Rejection may be made of some part of a legacy or by some of the legatees; and such rejection shall be effective to the extent and in respect of the part rejected and the legatees rejecting.

Article 226. It does not matter if the legacy is accepted after rejection, or if it is rejected after acceptance, provided the heirs accord their consent to it.

# CHAPTER 2

# RULES GOVERNING BEQUESTS

**Section I: The Legatee**

Article 227. i. If the legatee is alive at the time of the testator's death, he will be entitled to the legacy from the time of death, provided no particular time for the right to be due posterior to the death is stipulated by the text of the bequest.
ii. The legatee shall bear the expenses of the legacy since he has been entitled to it.

Article 228. i. Bequests of specific property[8] to persons not alive[9] or to a specified number of both living and non-living[10] persons at the same time will be valid. If any of the legatees is not alive at the time of the testator's death, his heirs shall be entitled to the proceeds of the property.[11] If there is no hope of any of the legatees being alive, then the properties of the legacy[12] shall belong to the testator's heirs.
ii. If any of the legatees is alive at the time of the testator's death or after it, he shall be entitled to the proceeds, and anyone who comes into existence after him will share

[8] That is, particular objects like house or land.
[9] For instance, a child to be born.
[10] As one saying: "I make a bequest to the children of Khaled"; and the latter had children at the time of the making of the will, and afterwards other children were born to him.
[11] That is, fruits of the thing, not the thing bequeathed.
[12] That is, the thing itself.

with him in the proceeds till such time as the hope of other legatees being found disappears. Thereafter the property and the proceeds shall go to the existing legatees and the share of those who have died shall be treated as their inheritable estate.

iii. If the legacy consists only of usufructs, the usufructs shall be due to those of the legatees who are alive at the time of the testator's death or after it. The property shall revert to the testator's heirs if there is no hope of any other legatee being alive.

Article 229. A perpetual bequest of usufructs to one's descendants and others shall be valid, provided a benevolent foundation is established thereby, which will give effect to the bequest according to the conditions laid down by the testator, as is the case with permanent international benevolent institutions, and in accordance with local laws. The selected executor shall be a member of this foundation. If no executor is found, then the judge or anyone appointed by him for the purpose shall be a member. If necessary, preference will be given in the legacy to those of the legatees who are needy, according to the priorities and the interests of the legatees and the objectives of the testator. Ownership of the property of which the usufruct has been bequeathed shall belong to the foundation, within the limits of one-third of the deceased's estate.

Article 230. i. A bequest to an undefined number of persons shall be valid; and it shall be applied only to those who were needy at the time of the testator's death. The task of its distribution among them shall be left to the individual judgement of the legacy's executor and he shall not be bound to act on the basis of universality or equality.

ii. The person entrusted with the task of giving effect to the legacy shall be selected in order to execute the legacy. If none is found, then the judge or one appointed by him for the purpose shall be the executor.

Article 231. If the bequest has been made to a defined number of



persons in words which characterised them but did not specify them by name and some of them were not competent to be legatees at the time of the testator's death, the remaining persons will be entitled to the entire legacy, consistent with the rules of this Section.

Article 232. If the legacy is a joint one between specified persons and a group or organisation, or between a group and an organisation, or between all of the above, every specified person and every individual of the limited group, and every unspecified organisation shall have a share in the legacy.

Article 233. i. A bequest to an unborn person shall be valid in the following circumstances:

a. If the testator acknowledged the existence of the foetus at the time of making the will, then the child must be born alive within a year or less.

b. If the pregnant woman was observing the *'idda* upon death or a final divorce, then the child must have been born alive also within a year from the time the *'idda* became due.

c. If the testator did not acknowledge the existence of the foetus, or if the pregnant woman was not observing *'idda*, then the child must have been born alive within nine months or less from the time of the execution of the will.

d. If the legacy was for the unborn child of a particular person, then in addition to the above mentioned provisions, the descent of the child from that particular person must have been established.

ii. Proceeds of the legacy since the legator's death till the birth alive of the child shall be kept in reserve for him and shall be his due.

Article 234. i. If a pregnant woman gives birth, at one time or at two different times separated by an interval of less than six months, to two or more living babies, the legacy shall be divided equally among them unless otherwise provided in the bequest.

ii. If one of them is stillborn, the one born alive shall be entitled to the entire legacy.
iii. If any of the babies dies after birth and if the legacy relates to the property itself, his share will pass on to his heirs. In the case of the legacy being of the usufruct, his share in its equivalent till the time of his death shall pass on to his heirs.

## Section II : The Subject of Bequest

Article 235. i. If a bequest made to a person who is not an heir is within the limits of one-third of the testator's net estate after liquidation of his debts, it shall be given effect to without the heirs' consent.
ii. A bequest made to an heir or in excess of the one-third, shall not be executed unless the heirs consent to it after the testator's death and the persons giving consent possess full legal capacity.
iii. A bequest shall not take effect on that portion of the deceased's estate which is absorbed by his debts, except with the consent of the creditor possessing full legal capacity or upon the lapse of the debt.
iv. Bequests made by a person who leaves no debt behind or has no heir, shall take effect to the extent of his whole estate without depending on anyone's consent.

Article 236. If the debt does not exhaust the entire estate, and the entire debt or a part of it has been paid out of a legacy, the legatee shall be entitled to recover the amount thus paid out of the legacy subject to the limits of one-third of the net estate after liquidation of the debt.

Article 237. If a legatee has been permitted to sell or barter a property and in doing so he has obtained by means of a trickery an amount in excess of one-third of the estate, the execution of the legacy shall be suspended till the heirs consent to it or he undertakes to make over the excess.

Article 238. If the legacy consists of a specified amount of cash or of property and the deceased's estate is under debt or contains invisible property and if the legacy exceeds



one-third of the visible estate, then the legatee shall be entitled to it, or else he shall be paid to the extent of the one-third and the remainder shall go to the heirs; and whenever anything of the invisible property appears, one-third of it shall be paid to the legatee until his due is completed.

Article 239. i. If a legacy is made of a shared portion of the inheritance, and it is under debt or it contains invisible property, the legatee shall be paid his due from the visible estate; and when anything of the invisible property appears he will be paid his share of it.
ii. If any heir owes a debt to the testator, such debt shall be accounted with similar kind of property in the estate and the debt shall thereby be deemed as visible property.
iii. If the deceased's estate does not contain any property similar in specie to that of this heir's debt, no accounting shall take place, but the heir's share in the estate shall be suspended for the realisation of the debt and the equivalent of this debt shall be deemed as visible property.
iv. Different denominations of cash and paper money shall be considered as of the same specie of money in the matter of accounting.

Article 240. i. If a legacy is made of a property or of something of the same kind, and if it is destroyed or converted into something else, the legatee shall get nothing.
ii. If a part of it is destroyed or converted, the legatee shall take whatever remains of it within the limits of one-third of the estate without taking into account the destroyed property.

Article 241. i. If a legacy comprises a cash portion sharing in the inheritance and it has subsequently been destroyed or converted to something else, the legatee shall get nothing.
ii. If a part of it has been destroyed or converted the legatee shall take the entirety of his legacy from the remainder not exceeding one-third of the deceased's.

Article 242. i. If a legacy has been made of a common share in some kind of the testator's property and it has subsequently been destroyed or converted, the legatee shall get nothing.

ii. If a part of it has been destroyed or converted, this part shall be deemed as having never existed, and the legacy will be discharged from the remainder.

**Section III: Legacy of Usufructs**

Article 243. i. If a legacy is made of a usufruct for a certain period of which the beginning and the end has been specified, the legatee shall be entitled to that usufruct for that period. If the period terminates before the testator's death, the bequest shall become void; and if a part of the period expires, the legatee shall be entitled to the usufruct for the unexpired period.

ii. If the beginning of the specified period is not specified, the period shall commence from the time of the testator's death, subject to the rule contained in the following Article.

Article 244. i. If any heir prevents the legatee from enjoying the usufruct of the property itself, he shall be guaranteed the equivalent of the usufruct.

ii. If all the heirs prevent the enjoyment of the usufruct, the legatee shall have the choice either to enjoy the usufruct of the particular property for another term or to accept their guaranteeing the equivalent of the usufruct.

iii. If the prevention comes from the side of the testator or if it is caused by an insurmountable obstacle intervening between the legatee and the enjoyment of the usufruct, he shall be entitled to enjoy it for another period of time after the cessation of the obstacle.

Article 245. If the corpus of the property of which the usufruct has been bequeathed admits of the enjoyment of its use in some other way than what has been specified in the bequest, it will be lawful for the legatee either to make



use of it in any way he sees fit, provided no harm is caused thereby to the corpus of the property of which the usufruct has been bequeathed.

Article 246. If fruits are the object of the legacy, the legatee shall have the fruits which exist at the time of the testator's death and whatever proceeds from them unless the contrary is proved by any evidence.

Article 247. The bequest of a part of the usufruct shall be met by apportionment of the crops or fruits between the legatee and the testator's heirs in proportion to the shares of each group; or by mutual agreement with regard to time and place[13] or by division in kind if the property involved admits of such division without damage. In case of difference of opinion, the court may specify any one of these methods.

Article 248. If the legacy is for enjoyment of the usufruct by one party and control and care by another party, both legacies shall be valid; the taxes imposed on the corpus of the property and the cost of its improvement shall be borne by the legatee enjoying the usufruct.

Article 249. A legacy of usufruct shall fail in the following circumstances:

i. By the legatee's death before the acceptance or rejection in full or in part of the property of which the usufruct has been bequeathed.

ii. By the legatee's becoming the owner of the corpus of the property of which the usufruct has been bequeathed.

iii. By the legatee's surrender of his right in it to the testator's heirs in lieu of some consideration or without consideration.

iv. By the corpus of the property being converted to something else.

Article 250. In determining whether a bequest of usufructs has exceeded one-third of the deceased's estate, calculation shall be made as follows:

i. Where the usufruct is bequeathed to the legatee for

[13] That is, an agreement for enjoying the usufruct by each.

life or for a period of more than ten years, it shall be deemed equivalent to the value of the property itself if the legacy is for all kinds of usufruct of the corpus of the property; and if the legacy is for part of the usufruct, it shall be deemed as equivalent to the proportion of the corpus or the property itself.

ii. If the usufruct is bequeathed for a period not exceeding ten years, then it shall be estimated on the basis of the value of the usufruct for this period.

iii. If the bequest is for a specific right[14] usufruct shall be estimated on the basis of the difference between the value of the corpus including the right bequeathed and its value without the right.

**Section IV: Rules Regarding Addition to Legacies**

Article 251. i. Where the legator adds something to the corpus of the legacy, the addition is not considered independent by itself, but shall be annexed[15] to the legacy.

ii. If the addition is of such a nature that it stands independently, the heirs shall share with the legatee in the total to the extent of the value of the addition.

iii. If the addition is of a nature which is usually allowed in such cases or if anything is found showing that the testator intended to annex it to the legacy, then such addition shall go with the legacy.

Article 252. If the testator dismantles the immovable property which has been bequeathed and has rebuilt it changing its features but not its nature, the corpus in its new form shall be deemed as the legacy.

Article 253. If the testator, after having made a bequest of a specific building, erects another building with it thereby creating a unit in such a way that the bequeathed property cannot be transferred independently, then the legatee shall share the property with the heirs to the extent of the value of his bequest.

[14] For instance, the right to reside.

[15] As when he plants a tree on the bequeathed land.



**Section V: Obligatory Legacy**

Article 254. i. Where a person dies and is survived by the children of his son who has predeceased him or who dies with him at the same time, then those grandchildren shall be entitled to a legacy of one-third of his estate according to the following proportions and conditions:

a. The obligatory legacy for those grandchildren shall be to the extent of their shares in their father's inheritance from his deceased ancestor, presuming that the father died after the death of the above mentioned ancestor, provided that the legacy shall not exceed one-third of the deceased's estate.

b. Those grandchildren shall not be entitled to a legacy if they inherited from their father's ancestor, whether a grandfather or grandmother or if that ancestor had during his lifetime and without having received any consideration made a bequest to them or gave them a property equivalent to what they would have been entitled according to the obligatory legacy. If the legacy made by him was less than this it shall be completed; if it was more, the excess shall be treated as his voluntary bequest. If he made bequests for more of them only, the others shall be entitled to the obligatory legacy to the extent of their shares.

c. This obligatory legacy shall be for children of the son or children of the son's son how low soever, whether one or more, the share of a male being twice that of a female; and every ancestor among them excluding his own descendants and every descendant only receiving the portion of his ancestor.

ii. This obligatory legacy shall be given priority over voluntary bequests in making payments out of one-third of the deceased's estate.

**Section VI: Legacies over which there is Competition**

Article 255. If the legacies exceed one-third of the deceased's estate and the heirs accord their consent thereto, and

the legacies do not exhaust the estate, or if the heirs do not accord their consent and the legacies cannot be met by the one-third, then the deceased's inheritance or its one-third, whatever may be the case, shall abate rateable provided that the legatee shall not receive in kind[16] except from the kind bequeathed.

Article 256. If the bequest relates to the performance of pious duties[17] and if the deceased's estate is not sufficient to perform all these duties, then the estate shall be equally apportioned between all these duties if they are of the same degree;[18] if not, the obligatory ones (*furud*) shall have priority over those which are essential (*wajibaat*), and the essentials (*wajibaat*) shall have priority over those which are optional (*nawaafil*).

[16] That is, where a specific object such as a horse or land has been bequeathed to the legatee.

[17] Such as legacies for the payment of the obligatory *zakat* on the testator's behalf, or the payment of necessary (*wajib*) *sadaqa al-fitr* or optional *sadaqa* to the poor.

[18] As when all the duties were obligatory ones (*furud*).

# Part Six

# INHERITANCE

CHAPTER 1

# GENERAL RULES

Article 257. i. The right of inheritance accrues on the death of the testator or on his being declared judicially dead.[1]

ii. To be entitled to inherit, the heir must be alive at the time of the death of the testator or at the time of his being judicially declared dead. A child in the womb shall be entitled to inherit if it satisfies the provisions of Article 233.

Article 258. If two persons die in such a way that it cannot be ascertained who died first, none of them will have a right of inheritance in the other's estate, whether they both died in the same accident or not.

Article 259. i. Payment shall be made out of the deceased's estate in the following order:

a. What is needed for preparing the deceased for his funeral and all the legitimate expenses incurred in this connection by the person obliged to perform these duties from death till internment.
b. The deceased's debts.
c. The obligatory legacy.
d. The voluntary bequests.
e. The shares due to the heirs in accordance with the order laid down in this statute.

ii. If there exists no heir, the deceased's estate shall be disposed of in the following order:

[1] As in the case of a missing person of whom it is not known whether he is alive or dead, as laid down in Article 209.

a. The claims of any person whom the deceased acknowledged as his kin through another.
b. The bequests of the deceased in excess of the limits prescribed for the execution of the will.
iii. If none of these exist, the deceased's estate or its residue shall revert to any Islamic institution of a religious nature, such as an endowment (*waqf*) upon a mosque, or of a charitable nature.

## CHAPTER 2

# THE GROUNDS AND METHODS OF INHERITANCE AND THE BARS ON IT

Article 260. i. The grounds of inheritance are affinity (marital relationship) and kinship (blood relationship).
ii. Inheritance takes place in three ways – on the basis of fixed obligatory portions (*farida*)[2] or on the basis of shares due to the agnatic heirs (*asabah*),[3] or on the basis of shares due to "uterine heirs".[4]
iii. Inheritance on the grounds of affinity takes place on the basis of fixed obligatory shares (*farida*).
iv. Inheritance on the basis of kinship takes place by means of fixed obligatory shares (*farida*) or on the basis of shares due to agnatic heirs, or in both ways together, or by means of shares due to uterine heirs. If an heir is entitled in two ways, he will inherit in both ways at the same time, subject to the provisions of Articles 268 and 293.

Article 261. i. The following shall bar inheritance:
a. The restrictions on bequests described in Article 220.

[2] That is, specified fractions of the deceased's net estate fixed by the law (Qur'an) for their beneficiaries. These fractions are a sixth (⅙), a third (⅓), two-thirds (⅔), an eighth (⅛), a quarter (¼) and a half (½).
[3] That is, the near relatives who inherit the residue of the deceased's estate after payment of the fixed obligatory portions to their beneficiaries (*ashab al farida*).
[4] That is, relatives other than the *ashab al-farida* and the agnatic heirs (*'asabat*).

b. Difference of religion between a Muslim and a non-Muslim.

CHAPTER 3

# INHERITANCE ON THE BASIS OF FIXED OBLIGATORY PORTIONS (*FARIDA*)

Article 262. i. A *fard* or "obligatory portion" is a specified portion of the deceased's estate due to an heir. The distribution of inheritance shall start with the beneficiaries of the obligatory portions (*ashab al-furud*). They are the father, the *de facto* grandfather how high soever, uterine brother (half-brother through the mother), uterine sister (half-sister through the mother), husband, wife, daughters, son's daughters how low soever, full sisters, consanguine sister (half-sister through the father), mother, *de facto* grandmother how high soever.

ii. The "*de facto* grandfather" or the agnatic grandfather (*al-jadd al-asabi*) means a male ancestor between whom and the deceased no female[5] intervenes, if any female intervenes in the relationship, then he is a "notional grandfather". And the "*de facto* grandmother"[6] means a female ancestor between whom and the deceased no notional grandfather intervenes.

[5] For instance, the father's father, and in contradistinction to the "notional grandfather" who is the mother's father; for the latter is neither a *sahib al-fard* (who is the beneficiary of an obligatory portion) nor an agnatic heir; but he is one of the uterine relations (*dhawi al-arham*).

[6] For instance, mother's mother or father's mother. As for the "notional grandmother" they are, on the other hand, mother of mother's father. These latter belong to the group of *dhawi al-arham* (uterine relatives).

b. Difference of religion between a Muslim and a non-Muslim.

CHAPTER 3

# INHERITANCE ON THE BASIS OF FIXED OBLIGATORY PORTIONS (*FARIDA*)

Article 262. i. A *fard* or "obligatory portion" is a specified portion of the deceased's estate due to an heir. The distribution of inheritance shall start with the beneficiaries of the obligatory portions (*ashab al-furud*). They are the father, the *de facto* grandfather how high soever, uterine brother (half-brother through the mother), uterine sister (half-sister through the mother), husband, wife, daughters, son's daughters how low soever, full sisters, consanguine sister (half-sister through the father), mother, *de facto* grandmother how high soever.

ii. The "*de facto* grandfather" or the agnatic grandfather (*al-jadd al-asabi*) means a male ancestor between whom and the deceased no female[5] intervenes, if any female intervenes in the relationship, then he is a "notional grandfather". And the "*de facto* grandmother"[6] means a female ancestor between whom and the deceased no notional grandfather intervenes.

[5] For instance, the father's father, and in contradistinction to the "notional grandfather" who is the mother's father; for the latter is neither a *sahib al-fard* (who is the beneficiary of an obligatory portion) nor an agnatic heir; but he is one of the uterine relations (*dhawi al-arham*).

[6] For instance, mother's mother or father's mother. As for the "notional grandmother" they are, on the other hand, mother of mother's father. These latter belong to the group of *dhawi al-arham* (uterine relatives).

Article 263. Subject to the provisions of Article 277 the father's, as also the true grandfather's, obligatory share (*fard*) is a sixth (1/6) if the deceased is survived by his child or child of a son how low soever.

Article 264. i. The obligatory share for one child of a mother is a sixth (1/6); and a third (1/3) if two or more, the shares of males and females being equal.

ii. If in the second instance the obligatory shares exhaust the deceased's estate,[7] and there coexist with the mother's children a full brother or full brothers, with or without one or more full sisters, the third shall be distributed among them in the above mentioned manner.

Article 265. i. For the husband the obligatory share is a half (1/2) if no child or child of the son exists how low soever, and a quarter (1/4) if a child or a child of a son how low soever exists.

ii. For the wife, even if she is in the process of completing her *'idda* from a revocable divorce at the time of her husband's death, the obligatory share is a quarter (1/4) if there exists no child or child of a son how low soever. She shall receive an eighth (1/8) if she coexists with a child or child of a son how low soever, subject to the provisions of Article 116 laid down before in connection with divorce during illness.

iii. If there are a number of wives, they shall share equally between them this obligatory portion.

Article 266. Subject to the provisions of Article 274:

i. For one daughter, the obligatory share is a half (1/2); for two or more two-thirds (2/3).

ii. For daughters of a son there is the aforementioned share if there does not exist a daughter or son's daughter higher in degree than them.

iii. For them, even if many, the obligatory share shall be

[7] As for instance, the deceased is survived by mother, husband, uterine brothers, and a full brother and others, as mentioned, in the above article, the mother shall receive a sixth (1/6), the husband a half (1/2), and the residue, that is a third (1/3), shall be divided equally between the remaining males and females.



a sixth (1/6) if they coexist with a daughter, or a daughter of a son higher in degree.

Article 267. Subject to the provisions of Articles 274 and 277:

i. For one full sister the obligatory share is a half (1/2), and two-thirds (2/3) if there are two or more.

ii. For consanguine sisters the obligatory share is the same as mentioned above, if they do not coexist with a full sister.

iii. For them, even if many, shall be a sixth (1/6) if they coexist with a full sister.

Article 268. i. For a mother, the obligatory share is a sixth (1/6) if she coexists with a child, or the child of a son how low soever, or two or more brothers or sisters.

ii. For her the obligatory share will be a third (1/3) in all other circumstances, except when she coexists with a husband or wife or father only, in which case her share will be a third (1/3) of the residue after paying the share of either husband or wife.

Article 269. For a *de facto* grandmother or grandmothers the obligatory share is a sixth (1/6), and it shall be divided between them equally irrespective of whether they are related from one side or two sides.

Article 270. If the fractional shares of the *ashab al-furud* (beneficiaries of fixed obligatory shares) amount to more than unity their shares shall abate rateably between them.

CHAPTER 4

# THE AGNATIC HEIRS AND THEIR SHARES

Article 271. i. If none of the *ashab al-furud* exists, or if they exist but their fractional portions do not exhaust the deceased's estate, the estate or its residue shall be distributed between the agnatic heirs.

ii. Agnatic heirs are of three kinds:

a. The agnate in his own right (*asaba bi-nafsihi*).

b. The agnate because of the right of another (*asaba bi-ghayrihi*).

c. The agnate with another (*asaba ma'a ghayrihi*).

Article 272. Agnates in their own right belong to four types of relationships, each type having priority over the other in the matter of inheritance according to the following order:

i. Sonship, which includes sons, and sons of a son how low soever.

ii. Fatherhood, which includes father, *de facto* grandfather how high soever.

iii. Brotherhood, which includes full brothers and consanguine brothers and their sons how low soever.

iv. Uncleship, which includes the deceased's full uncles and consanguine uncles, and likewise the uncles of his father and *de facto* grandfather how high soever, and the sons of these persons how low soever.

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iii. Brotherhood, which includes full brothers and consanguine brothers and their sons how low soever.

iv. Uncleship, which includes the deceased's full uncles and consanguine uncles, and likewise the uncles of his father and *de facto* grandfather how high soever, and the sons of these persons how low soever.

Article 273. i. Where there exists a number of "agnates in their

own right" of the same type, the nearest of them to the deceased in the degree of relationship shall be entitled to the inheritance.

ii. If they are of the same type and degree of relationship, the priority shall be determined on the basis of the strength of blood relationship. Thus the one who is related to the deceased from the sides of both father and mother shall have priority over the one who is related only from the father's side.

iii. If they were all equal in respect of type, degree and strength of blood relationship, they shall equally share the inheritance.

Article 274. i. "Agnates because of the right of another" are the following females:

a. Daughters with their sons.

b. Daughters of a son how low soever with the sons of their sons how low soever if they are equal in degree in all respect, or if they are lower than the daughters in degree, provided the latter did not inherit in any other way.

c. Full sisters with full brothers, and consanguine sisters with consanguine brothers.

ii. In these cases a male shall take twice the portion of a female.

Article 275. "Agnates along with others" are the following females:

i. Full or consanguine sisters with daughters or sons of son how low soever. These female agnates shall be entitled to the residue of the deceased's estate after the distribution of the obligatory shares (*furud*).

ii. In this case, the full sisters shall be deemed as full brothers, and consanguine sisters as consanguine brothers, and these females shall take their places in relation to the other agnatic heirs in the matter of priority on the basis of type, degree and strength of blood relationship.

Article 276. i. Where a true grandfather coexists with full or consanguine brothers or sisters, he will share with them



like a brother if they are all males and females or females being agnates with descendants of females.

ii. If the grandfather coexists with sisters who are not "agnates because of the right of other males", not being with an heir who is a descendant of a female, he shall be entitled as an agnate to the residue of the estate after the payment of the portions of the *ashab al-furud*.

iii. Provided that if the distribution of inheritance on the basis of agnatic relationship and according to the foregoing manner deprives the grandfather from inheritance or reduces his share to less than the one-third, he shall be deemed to be entitled to the obligatory share of a third.

iv. Those who are excluded by consanguine brothers and sisters shall not be taken into consideration in the matter of distribution of the estate.

Article 277. If the father or grandfather coexists with the daughter or son's daughter how low soever, he shall be entitled to a sixth (1/6) as an obligatory share, and to the residue as an agnatic heir.

CHAPTER 5

# EXCLUSION AND REVERSION (RETURN)

## Section I: Exclusion

Article 278. i. "Exclusion" means that a person who is otherwise entitled to inherit shall not in fact inherit because of the existence of another heir.

ii. The excluded person in turn excludes whoever comes after him in the order of precedence.

Article 279. A person who is deprived of his inheritance for any lawful reason shall not exclude any other heir.

Article 280. i. A *de facto* grandmother is absolutely excluded by the mother; in the same way a distant grandmother is excluded by a near grandmother, and the paternal grandmother is excluded by the father.

ii. A *de facto* grandfather excludes the grandmother if she were an ascendant of his.

Article 281. The mother's children are excluded by the father and by the *de facto* grandfather how high soever, and by the child and the son's child how low soever.

Article 282. i. Each of the son and the son's son, how low soever, excludes the son's daughter who is lower than them in the degree of descent.

ii. She is also excluded by two daughters, or a son's two daughters if higher than her in the degree of ascent, unless she coexists with someone with whom she becomes an agnate according to the provisions of Article 274.

Article 283. The full sister is excluded by each one of the father, the son and the son's son how low soever.

Article 284. The consanguine sister is excluded by each one of the father, the son and the son's son how low soever; likewise she is excluded by a full brother and a full sister, if she is an "agnate with another", as provided in Article 274, and by two full sisters if no consanguine brother exists.

**Section II: Reversion (*Radd*)**

Article 285. i. Where the obligatory shares (*furud*) do not take up the entire estate and no agnatic heir exists, the residue shall revert to the beneficiaries of obligatory shares (*ashab al-furud*) except the husband and the wife, and it shall be apportioned among them in proportion to their respective shares.

ii. The residue of the estate shall revert to either the husband or wife if there does not exist any male agnatic heir nor any of the *ashab al-furud* nor any uterine relation.

CHAPTER 6

# INHERITANCE BY UTERINE HEIRS

Article 286. i. If none of the *ashab al-furud* or agnatic heirs exist, the uterine heirs shall inherit the deceased's estate.

ii. "Uterine heirs" are those relatives who do not belong to the group of *ashab al-furud* or to the group of agnatic heirs described before.

**Section I: Classification of Uterine Relatives**

Article 287. i. Uterine relations are of four categories, each having precedence over the other in the matter of inheritance, according to the following order:

a. Those who are among the descendants of the deceased, namely children of daughters and children of sons' daughters, how low soever.

b. Those who are from among the ascendants of the deceased, namely notional grandfathers and notional grandmothers how high soever.

c. Those who are from among the descendants of the deceased's parents, namely children of full sisters, children of uterine sisters, daughters of full brothers or of consanguine brothers and the descendants of those children how low soever.

d. Those who are from among the descendants of one of the grandfathers or grandmothers of the deceased how high soever.

ii. This fourth category is subdivided into a number of "grades" in an ascending order and each grade in turn into a number of "classes" in a descending order:

a. The grades of this fourth category are confined to the descendants of any grandfather, how low soever. So the first grade consists of the descendants of the nearest grandfathers of the deceased (i.e. his father's father, mother's father, father's mother and mother's mother); and the second grade consists of the descendants of his parents' grandfathers and the third grade consists of the descendants of the grandfathers of his two grandfathers; and so on.
b. The classes of each grade consist of the "degrees" of the descendants of each grade. Hence the uterine uncles, the aunts, the maternal uncles and the maternal aunts constitute the first class from among the first grade; and the children of these persons and daughters of full or consanguine uncles constitute its second class; and so on.

**Section II: Rules of Inheritance by Uterine Relations**

Article 288. i. Of the first category of uterine relations, the nearest in relationship to the deceased shall have priority over the others.
ii. If they are equal in the degree of relationship, then the one who is descended from someone who has an obligatory share (*sahib al-fard*) shall have priority over someone descended from a uterine relation.
iii. If all of them were descended or not descended from someone who has an obligatory share (*sahib al-fard*), they will equally share the inheritance between them.

Article 289. i. With regard to the second category of the uterine relations also, the order of precedence shall be on the basis of the degree of nearness to the deceased, and then on the basis of whether one has or has not someone who has an obligatory share (*sahib al-fard*) as an intermediate ancestor, as in the case of the first category.
ii. If they are all equal in respect of the degree of nearness to the deceased and in respect of ancestry then the following points shall be taken into consideration:



a. If all of them are from the father's line or from the mother's line, they will equally share the inheritance between them.
b. If their lines differ, then two-thirds of the estate shall be due to the relations in the father's line, and one-third to the relations in the mother's line.

Article 290. i. With regard to the third category of uterine relations also, the nearest in the degree of relationship to the deceased shall have priority over the others.
ii. If they are equal in the degree of nearness, the descendants of an agnatic relation shall have priority over the descendants of a uterine relation.
iii. If all of them are children of agnatic relations or of uterine relations, the one having the strongest blood relationship shall have priority over the others. Therefore, the one whose ancestry is traced to both the parents shall exclude the one whose ancestry is traced to only one of the parents, and the one whose ancestry is traced to the father shall exclude the one whose ancestry is traced to the mother.
iv. If they are equal in respect of the strength of blood relationship also, they will share the inheritance equally between them.

Article 291. i. Each grade of the four categories with all their classes shall have priority over any grade above it (i.e. ascending grade) with all its classes.
ii. Each class of every grade shall exclude the classes below it (i.e. descending classes) in the same grade.

Article 292. i. Where there are a number of persons in the first class of each of the four grades, and all of them are from only the father's line, such as aunts, or from only the mother's line, such as maternal uncles, the strongest in blood relationship shall have priority. Hence full aunts or consanguine aunts shall exclude a uterine uncle; similarly full maternal aunts shall exclude a uterine maternal uncle. If they are equal in the strength of blood relationship, they will share the inheritance between them.

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b. The classes of each grade consist of the "degrees" of the descendants of each grade. Hence the uterine uncles, the aunts, the maternal uncles and the maternal aunts constitute the first class from among the first grade; and the children of these persons and daughters of full or consanguine uncles constitute its second class; and so on.

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Article 292. i. Where there are a number of persons in the first class of each of the four grades, and all of them are from only the father's line, such as aunts, or from only the mother's line, such as maternal uncles, the strongest in blood relationship shall have priority. Hence full aunts or consanguine aunts shall exclude a uterine uncle; similarly full maternal aunts shall exclude a uterine maternal uncle. If they are equal in the strength of blood relationship, they will share the inheritance between them.

ii. If some of them are from the father's line, and some others from the mother's line, then two-thirds shall be due to the father's group, and one-third to the mother's group, and then the share of each individual in each group shall be distributed on the basis of the strength of blood relationship in the manner explained in the preceding paragraph.

Article 293. i. In the descending classes of each of the four grades, the nearer in the degree of relationship (to the deceased) shall have priority over the more remote one, even if one of them is from the father's line and the other is from the mother's line.

ii. If they are equal in degree and are of the same line, the child of an agnatic relation shall have priority over the child of a uterine relation. Thus the daughter of a full uncle shall exclude the son of a uterine uncle. If all of them are children of agnatic relations or of uterine relations, the strongest in blood relationship shall have the priority. Thus the child of a full aunt shall exclude the child of a consanguine aunt, and the child of a consanguine aunt shall exclude the child of a uterine aunt.

iii. If, notwithstanding equality in degree, some of them are from the father's line and the others from the mother's line, two-thirds shall be due to the father's group, and one-third to the mother's group. Then the share of each group will be distributed among the individuals of that group in the manner explained in the preceding paragraph, the child of an agnatic relation and then the strongest in blood-tie being given priority.

Article 294. i. In clear cases of uterine relations, a male's share shall be twice that of a female.

ii. If there exists only one such relation, that one alone, whether male or female, shall receive the inheritance.

iii. Multiplicity of the lines of blood relationship shall be of no consequence unless the sides of blood relationship



are increased thereby. Thus a person may be from the father's side and the mother's side at the same time.

CHAPTER 7

# RULES REGARDING ACKNOWLEDGED KINSMEN

Article 295. If a person acknowledges someone of unknown parentage as his kinsman through another, the person thus acknowledged shall be entitled to inherit if the following conditions are satisfied:

i. That it is not established that the acknowledged person is descended from the person through whom the kinship is claimed;

ii. That the person who acknowledged did not revoke his acknowledgement; and

iii. That there exists no legal bar to inheritance and that the acknowledged person was alive at the time of the death of the person who acknowledged him or at the time of his being declared dead.

Article 296. The portion of the deceased's estate which is greater if the child in the womb is considered either male or female shall be reserved.

Article 297. Where a man dies leaving his wife or a divorcee in the state of *'idda*, the child in her womb shall inherit only if it is born alive and its descent from the deceased is established according to the conditions laid down in this statute for ascertaining parentage.

Article 298. i. If after its birth the portion reserved for the child in the womb falls short of what it is entitled to, the remainder shall be taken from the shares of those of the heirs who have taken more than their due.

ii. If the portion reserved for the child in the womb is in excess of what is its due the excess shall be returned to those of the heirs who are entitled to it.

Article 299. i. The missing person's share of inheritance from the deceased's estate shall be reserved for him. If he reappears alive he shall receive his share, and if he is declared dead his share shall be returned to those of the heirs who were entitled to it at the time of the death of the testator.

ii. If, after being declared dead, he reappears alive, he shall receive what remains of his share in the hands of the other heirs.

Article 300. Subject to the time limit prescribed in Article 297, an illegitimate child or a mother's child, in case of *li'aan*, shall inherit from the mother and her kinsmen, as also the mother of such children and kinsmen shall inherit from such children.

Article 301. i. A "waiver" means mutual agreement among the heirs to exclude some of them from inheritance in return for some tangible consideration.

ii. If one of the heirs waives his rights in favour of another, that other shall take the place of the one who waives his rights and shall receive his share.

iii. If one of the heirs mutually agrees with the other heirs to waive his rights and if he has been paid out of the deceased's estate, his share will be divided among them in proportion to their respective shares in it; and if the payment was made out of their own assets and the agreement did not specify the manner of dividing his share, it will be divided among them in proportion to the payment made by each of them.

Article 302. Anything not provided for in the text of this statute shall be determined on the basis of the most preponderant interpretation according to the Hanafi school of law.

Article 303. The provisions of this statute should apply to all Muslim minorities in non-Muslim lands and similarly we recommend their adoption in Islamic countries.

MUSLIM PERSONAL LAW deals with some aspects of Muslim civil law which historically have been implemented both under Muslim and non-Muslim colonial rule. This book is for anyone who wishes to acquire more than a superficial knowledge of the subject. It summarises comprehensively those aspects of the Shari'ah that govern the most fundamental personal relationships in a straightforward way. It represents one of the mainstream Sunni attempts to codify these aspects of Islamic law, based on centuries of practical application and experience, relying mainly on the Hanafi *madhhab*.

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